Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

PATRICIA MCCAFFREY, GERALD HILL, RON LUNDY,
Petitioners,

v.

OONA R.- S.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can individual public school employees, claiming qualified immunity, be sued through the vehicle of 42 U.S.C. Section 1983 for a failure to prevent the sexual harassment of a student in violation of Title IX of the Education Amendments of 1972, an issue upon which the Courts of Appeal are in conflict.

Whether the standards of liability under Title VII, which prohibits discrimination based on sex in the employment context, are an appropriate analogue for determining liability for sex discrimination in violation of Title IX, as to which the Courts of Appeal are in conflict.

For purposes of qualified immunity, whether this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (holding that money damages are an appropriate remedy under Title IX) clearly established that individual public school employees can be held liable under Title IX for hostile environment sexual harassment of a sixth grade student by third parties.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
STATEMENT OF JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
A. Factual Background	4
B. Procedural History	5
REASONS FOR GRANTING THE WRIT	7
I. THERE IS AN INTOLERABLE CONFLICT IN THE CIRCUITS AS TO WHETHER SECTION 1983 CLAIMS ARE SUBSUMED BY TITLE IX	7
A. Application of the Middlesex Doctrine to Title IX: *Pfeiffer v. Marion Center Area School District*	8
B. The Third and Seventh Circuits Have Followed the Second Tier Reasoning in *Pfeiffer v. Marion Center Area School District*; the Sixth and Tenth Circuits Have Not	9
II. THE NINTH CIRCUIT'S OPINION DIRECTLY CONTRADICTS THIS COURT'S MANDATE IN SIEGERT v. GILLEY AND INVOLVES AN ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT	12

TABLE OF CONTENTS—Continued

Page

A. *Siegert v. Gilley* Analysis Step One: Is there a Federal Constitutional or Statutory Right to Sue Individuals Under Section 1983 for Violations of Title IX 13

B. *Siegert v. Gilley* Analysis Step Two: Was the Law Clearly Established and Application of the Heightened Pleading Standard 14

III. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE ELEVENTH AND FIFTH CIRCUITS IN APPLYING TITLE VII STANDARDS TO TITLE IX CLAIMS 16

IV. FRANKLIN DID NOT CLEARLY ESTABLISH THAT INDIVIDUAL PUBLIC SCHOOL EMPLOYEES COULD BE LIABLE FOR MONEY DAMAGES UNDER TITLE IX FOR HARASSMENT BY THIRD PARTIES 19

CONCLUSION 21

APPENDIX A 1a

APPENDIX B 15a

APPENDIX C 16a

TABLE OF AUTHORITIES

Cases Cited: Page

Allen v. Sakai, 48 F.3d 1082 (9th Cir. 1994) 13
Armendariz v. Penman, 75 F.3d 1311 (9th Cir. 1996) (*en banc*) 12, 13
Aurelia D. v. Monroe County Bd. of Educ., 862 F.Supp. 363 (M.D. Ga. 1994) (*aff'd* 120 F.3d 1390) 20
Baker v. McCollan, 443 U.S. 137 (1978) 7
Bougher v. Univ. of Pittsburg, 713 F.Supp. 139 (W.D. Penn. 1989), *aff'd* 882 F.2d 74 (3d Cir. 1989) 12
Branch v. Tunnell, 937 F.2d 1382 (9th Cir. 1991) .. 13, 15
Cannon v. Univ. of Chicago, 441 U.S. 677 (1979) .. 8, 14
Davis v. Monroe County Bd. of Educ., 74 F.3d 1186 (11th Cir. 1996), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996) 5, 6
Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (*en banc*) (*petition for cert. filed*, November 19, 1997) 6, 16
Doe v. Petaluma City School Dist., 54 F.3d 1447 (9th Cir. 1995) ..... *passim*
Floyd v. Waiters, 133 F.3d 786 (11th Cir. 1998) (*petition for cert. filed*, April 20, 1998) 14
Franklin v. Gwinnett County Public Schools, 503 U.S. 60 (1992) ..... *passim*
Franklin v. Gwinnett County Public Schools, 911 F.2d 617 (11th Cir. 1990) 9
Guardians Ass'n v. Civil Service Comm'n of N.Y. City, 463 U.S. 582 (1983) 8
Harlow v. Fitzgerald, 457 U.S. 800 (1982) 20
Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit, 507 U.S. 163 (1993) 15
Lillard v. Shelby County Bd. of Educ., 76 F.3d 716 (6th Cir. 1996) 11
Lipsett v. Univ. of Puerto Rico, 864 F.2d 881 (1st Cir. 1988) 14
Mendocino Environmental Center v. Mendocino County, 14 F.3d 457 (9th Cir. 1994) 15

TABLE OF AUTHORITIES—Continued

Page

Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986) 17, 18
Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n, 453 U.S. 1 (1980) ..... *passim*
Mitchell v. Forsyth, 472 U.S. 511 (1985) 3
Oona R.-S. v. Santa Rosa City Schools, 890 F. Supp. 1452 (N.D. Cal. 1995) 2
Oona R.-S. v. McCaffrey, No. 95-16046, 1998 WL 216944 (9th Cir.) ..... *passim*
Pennhurst v. Halderman, 451 U.S. 1 (1981) 16
Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3d Cir. 1990) ..... *passim*
Rosa F. Garza v. Galena Park Indep. School District, 914 F.Supp. 1437 (S.D. Tex. 1994) 20
Rosa H. v. San Elizario Indep. School Dist., 106 F.3d 648 (5th Cir. 1997) 17
Rowinski v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996) 6, 16, 17
Seamons v. Snow, 84 F.3d 1226 (10th Cir. 1996) .. 11
Seneway v. Canon McMillan School Dist., 969 F. Supp. 325 (W.D.Penn. 1997) 10
Siegert v. Gilley, 500 U.S. 226 (1991) ..... *passim*
Smith v. Metro. School Dist. Perry Township, 128 F.3d 1014, (7th Cir. 1997) (*reh'g and suggestion for reh'g en banc denied*, Dec. 16, 1997) (*petition for cert. filed*, Mar. 16, 1998) 14, 17, 18
Smith v. Robinson, 468 U.S. 992 (1984) 7
Stilley v. Univ. of Pittsburg, 968 F.Supp. 252 (W.D.Penn. 1996) 10
Waid v. Merrill Area Pub. Schools, 91 F.3d 857 (7th Cir. 1996) 7, 10
Williams v. School Dist. of Bethlehem, PA, 998 F.2d 168 (3d Cir. 1993) (*cert. denied*, 510 U.S. 1043 (1994)) 9

Statutes Cited:

20 U.S.C. § 1681(a) 2
20 U.S.C. §§ 1681, *et seq.* ..... *passim*

TABLE OF AUTHORITIES—Continued

	Page
28 U.S.C. § 1254(1)	2
28 U.S.C. § 1343	2
28 U.S.C. § 1367(a)	2
42 U.S.C. § 1983	*passim*
42 U.S.C. § 2000d	8
42 U.S.C. § 2000e-2	4
Cal. Admin. Code tit. 5, § 80413	4
Cal. Educ. Code § 44203	4
Cal. Educ. Code § 44320	4

Other Authorities Cited:

Federal Rules of Civil Procedure, Rule 12(b)(6)	5
Sup. Ct. Rule 14.1(a)	15

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PETITION FOR WRIT OF CERTIORARI

Petitioners Patricia McCaffrey, Gerald Hill, and Ron Lundy (collectively "Public School Employees") respectfully request that a writ of certiorari be issued to review the Order of the United States Court of Appeals for the Ninth Circuit entered on May 5, 1998, in order to resolve conflicts between the circuit courts of appeal on the important issues here presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Oona R.-S. v. McCaffrey,* No. 95-16046 (M. Schroeder, J.), is reported at 1998 WL 216944 (9th Cir.). It is reprinted in Appendix A hereto (App. A) at page 1a. The opinion of the District Court

in *Oona R.-S. v. Santa Rosa City Schools,* No. CV-94-0623-TEH (T. Henderson, J.), is reported at 890 F.Supp. 1452 (N.D. Cal. 1995). (App. C).

STATEMENT OF JURISDICTION

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was entered April 24, 1998, and amended May 5, 1998. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc*.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Original jurisdiction of the District Court was invoked by respondent under 28 U.S.C. § 1343 and § 1367(a).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, *et seq.*) ("Title IX") provides, in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a).

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

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[1] The text of the Order (App. A, p. 2a) states that the Public School Employees' Petition for Rehearing was denied and suggestion for rehearing *en banc* was rejected; a separate order to this effect was never issued. However, a judgment affirming Judge Henderson's Order was filed and entered on May 5, 1998, as amended. (App. B, p. 15a.)

STATEMENT OF THE CASE

The issues here presented affect every teacher and every administrator of public educational institutions receiving federal funding, from elementary level through higher education, and are of paramount importance. The fundamental issue is whether the employees of a public school, which receives federal funding, are immune from suit against them in their individual capacities for asserted violations of Title IX, based upon the doctrine of qualified immunity. The statute itself provides relief only against the recipient of the federal funding (in this case, the Santa Rosa School District, not a party to the petition herein). However, the Public School Employees have been sued pursuant to 42 U.S.C. § 1983 ("Section 1983") for the identical conduct which comprises respondent's Title IX claim: hostile environment sexual harassment by third parties. The Section 1983 cause of action, whose components include both Equal Protection and Title IX, necessarily mandates an analysis of the school employees' defense from liability under the doctrine of qualified immunity, an issue which must be resolved at the earliest opportunity. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

The analysis required to determine whether qualified immunity bars respondent's Section 1983 cause of action is set forth in *Siegert v. Gilley,* 500 U.S. 226, 232-233 (1991). The first step of the analysis is to determine whether the underlying substantive statute (Title IX) creates rights enforceable against the Public School Employees under Section 1983. The Ninth Circuit's resolution of this issue presents an intolerable conflict between the circuits.

Once the first determination has been made, the next step is to determine whether the law had been clearly established by the 1992-1993 school year (the time frame in which respondent's underlying allegations were stated

to have occurred) that the Public School Employees' failure to prevent teacher-student or student-student harassment is violative of Title IX. The circuits are hopelessly split in their analysis of this issue and the issue whether Title VII (42 U.S.C. § 2000e-2) is an appropriate analogue with respect to both teacher-student and student-student harassment.

A. Factual Background

Oona R.-S. ("respondent") was a sixth grade student at J.C. Fremont Elementary School in the Santa Rosa School District in Sonoma County, California, during the 1992-1993 school year. In February 1994, respondent filed a complaint in Federal Court alleging that she was subjected to sexual harassment for a period of two months by a student teacher, Drew Ibach,[2] who was removed from the school within three weeks of receiving the complaint by respondent; she also alleges a sexually hostile environment created by the male sixth grade students in her classroom throughout the school year.[3]

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[2] Under California law, institutions of higher education that conduct a program of professional preparation for a teaching credential are encouraged to operate and supervise professional preparation programs, including student teaching, and school districts are encouraged to cooperate with public and private institutions of higher education in the operation of the professional preparation programs so described. Cal. Educ. Code §§ 44203, 44320; Cal. Admin. Code tit. 5 § 80413 (1997). Pursuant to this legislative directive, the Santa Rosa School District allows placement of these students as volunteers into classrooms around the district; these "student teachers," like Drew Ibach, are not employees of the District.

[3] A more exhaustive description of the allegations is contained in the District Court Opinion, 890 F.Supp. at 1456-57, App. C, pp. 17a-23a. The Order appealed from disturbingly includes an inflammatory fact within its summary which appears *nowhere* in the complaint: the statement that Ibach allegedly "kissed" respondent and other girls. For this reason, the Public School Employees refer this Court to the District Court opinion's summary of facts, rather than the Ninth Circuit's embellished rendition of the facts.

During the 1992-1993 school year, petitioner McCaffrey was respondent's sixth grade teacher; petitioner Gerald Hill was the Principal of J.C. Fremont Elementary; and petitioner Ron Lundy was the Director of Elementary Education for the School District. None are alleged to have personally participated in any sexually harassing conduct against respondent, but are alleged to have inadequately failed to prevent and respond to respondent's complaints in their supervisorial capacity over Ibach and the male sixth grade students.

Based upon respondent's allegations of teacher-student harassment and student-student harassment against her, the Public School Employees have been sued individually pursuant to Section 1983.

B. Procedural History

The Public School Employees filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), which, *inter alia*, sought to dismiss the individual Public School Employees from respondent's Section 1983 cause of action based upon a qualified immunity. On May 2, 1995, the United States District Court for the Northern District, Judge Thelton E. Henderson, denied the Motion to Dismiss. (App. C.) The Public School Employees appealed Judge Henderson's ruling, which was upheld by the United States Court of Appeals for the Ninth Circuit (3-0) in an amended opinion dated August 25, 1997.

The August 25, 1997, decision was predicated upon the holding of the Eleventh Circuit in *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996) (herein "*Davis I*"). *Davis I* held that a school board which knowingly permitted student-student sexual harassment created a hostile environment in violation of Title IX's mandate against discrimination based on sex. *Davis I* conflicted with a decision in the Fifth Circuit,

Rowinski v. Bryan Indep. School Dist., 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996). Acknowledging the conflict in the circuits, the Ninth Circuit adopted the reasoning of *Davis I*, and affirmed the lower court's denial of qualified immunity.

Eight days after the Ninth Circuit issued its opinion, the Eleventh Circuit reversed its holding in *Davis I* upon an *en banc* rehearing. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*) (*petition for cert. filed*, November 19, 1997) (herein *"Davis II"*). The *Davis II* court held that an entity is not liable under Title IX for failure to prevent student-student hostile environment sexual harassment, and declined to apply the standards of Title VII to Title IX. *Davis II*, 120 F.3d at 1399 n. 13.

Based upon the reversal of *Davis I*, the Public School Employees immediately filed a Petition for Rehearing with a suggestion for rehearing *en banc* in the Ninth Circuit, as the split in the circuits that was created by the *Davis I* opinion no longer existed. The Ninth Circuit denied the Petition for Rehearing but withdrew its earlier August, 1997, opinion and filed a new opinion (2-1, Hall, J., dissenting) amended on May 5, 1998, disregarding *both* the Fifth Circuit *Rowinski* and Eleventh Circuit *Davis II* holdings and predicating its decision solely on this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), in denying the Public School Employees qualified immunity. The May 5, 1998 opinion is the subject of the present petition, as it has created a new conflict between the circuits.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN INTOLERABLE CONFLICT IN THE CIRCUITS AS TO WHETHER SECTION 1983 CLAIMS ARE SUBSUMED BY TITLE IX

The Ninth Circuit's recognition of a cause of action against individual school teachers for failing to prevent sexual harassment by third parties is analytically defective. Further, in establishing a Section 1983 cause of action against the Public School Employees, its decision is in direct conflict with the Third and Seventh Circuits (*Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990); *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996)).

The Ninth Circuit, without any analysis, allowed a Title IX claimant to assert a Section 1983 claim against individual teachers for conduct identical to that comprising the claimant's Title IX cause of action. As discussed below, determining whether a valid federal claim is asserted at all is the first step of the *Siegert v. Gilley* analysis for qualified immunity.

Section 1983 is a statutory remedy which Congress may replace with an alternative remedy; "[t]he crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Section 1983 is a vehicle through which rights otherwise created by statute or constitution may be enforced. It is not a source of substantive rights. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1978). When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under Section 1983; Congress' intent to preclude resort to Section 1983 need not be based upon express stautory provisions, but may be demonstrated where the alternative remedial scheme is sufficiently comprehensive. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453

U.S. 1, 20-21 (1980) (herein referred to as "the *Middlesex* doctrine").

A. Application of the Middlesex Doctrine to Title IX: *Pfeiffer v. Marion Center Area School District*

As early as 1990, the Third Circuit recognized that constitutional claims arising from conduct identical to that comprising an alleged Title IX violation were completely subsumed within the comprehensive remedial scheme of Title IX. In *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990), the Third Circuit considered the fundamental question answered by this Court in *Franklin v. Gwinnett County Pub. Schools*: are compensatory damages an available remedy for asserted violations of Title IX? The question was answered affirmatively by the *Pfeiffer* court, pursuant to a two-tiered analysis of Title IX. First, following this Court's guidance in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), the court recognized that "Congress intended to create remedies in Title IX comparable to those available under Title VI." *Pfeiffer*, 917 F.2d at 787 (Title VI, codified at 42 U.S.C. § 2000d (1994), prohibits racial discrimination by recipients of federal funding). Applying the majority holding in *Guardians Ass'n v. Civil Service Comm'n of N.Y. City*, 463 U.S. 582 (1983), which found that compensatory relief is available for Title VI violations when *intentional* discrimination is present, *Pfeiffer* concluded that compensatory relief is available under Title IX as well. *Pfeiffer*, 917 F.2d at 788.

The second tier of the analysis in *Pfeiffer* dealt with the question whether the plaintiff's constitutional claims, there based on the Equal Protection clause of the Fourteenth Amendment, were subsumed by Title IX. Citing cases which applied the *Middlesex* doctrine and which held that Title IX provides a comprehensive remedial scheme (including the availability of compensatory damages pursuant to the *Pfeiffer* opinion itself), the *Pfeiffer* court affirmed

the district court's finding that the constitutional claims were subsumed by the *Middlesex* doctrine and Title IX's comprehensive remedial scheme. *Pfeiffer*, 917 F.2d at 789.

This Court granted *certiorari* in *Franklin v. Gwinnett County Pub. Schools* because of the conflict created between the Third Circuit's decision in *Pfeiffer* (finding compensatory damages were available under Title IX), and the Eleventh Circuit's decision in *Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617 (11th Cir. 1990) (finding no compensatory damages available) (*rev'd in part by Franklin*, 503 U.S. 60 (1992)). *Franklin*, 503 U.S. at 65. This Court ultimately adopted what was essentially the first tier of the *Pfeiffer* analysis, setting forth a nearly identical appraisal of the comparisons between Title IX and Title VI. The Public School Employees urge this Court to now expressly adopt the second tier of the *Pfeiffer* analysis, the application of the *Middlesex* doctrine to Title IX. This second tier conclusion aided the *Pfeiffer* court in determining that Title IX provides a comprehensive remedial scheme, including damages, thus supplanting potential concurrent claims brought pursuant to Section 1983.

B. The Third and Seventh Circuits Have Followed the Second Tier Reasoning in *Pfeiffer v. Marion Center Area School District*; the Sixth and Tenth Circuits Have Not

In *Williams v. School Dist. of Bethlehem, PA*, 998 F.2d 168 (3d Cir. 1993) (*cert. denied*, 510 U.S. 1043 (1994)), the plaintiff brought an action under Title IX and Section 1983 against a school district [4] for violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment, when the district prohibited plaintiff (a male) from participating on the girls' field

[4] The plaintiff did not sue individuals pursuant to Section 1983 in *Williams*; thus, the issue of qualified immunity was not raised.

hockey team. The court, applying this Court's reasoning in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20-21, held that the constitutional claims were subsumed in Title IX, and precluded because they were based on matters "fully addressed by the comprehensive scheme in Title IX." *Williams*, 998 F.2d at 176 (*following Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d at 789). *Williams* has been followed in cases involving alleged sexual harassment of students by teachers as well. *See Stilley v. Univ. of Pittsburg*, 968 F.Supp. 252 (W.D. Penn. 1996); *Seneway v. Canon McMillan School Dist.*, 969 F.Supp. 325 (W.D. Penn. 1997).

Similarly, the Seventh Circuit was asked to "consider the relationship between [Section] 1983 and Title IX" in a case brought by a teacher alleging both Title VII violations and intentional discrimination pursuant to Title IX and Section 1983. *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996). The Seventh Circuit followed the Third Circuit's mandate in *Pfeiffer v. Marion Center Area School Dist.*, and held:

> [A] plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and [Section] 1983. [ ] In particular, a plaintiff may not claim that an instance of intentional discrimination simultaneously creates causes of action under Title IX and under § 1983 and the Equal Protection Clause of the Fourteenth Amendment; *the availability of a Title IX claim precludes the pursuit of a § 1983 claim. Waid*, 91 F.3d at 862 (emphasis added), *citing Williams*, 998 F.2d at 176.

While *Waid* did not involve a claim of sexual harassment by a student, its sound reasoning extends to all claims whose genesis is Title IX:

> The Third Circuit's approach to this question is persuasive, and we will follow it. By enacting Title

> IX, Congress created a strong incentive for schools to adopt policies that protect federal civil rights. If educational institutions do not adequately safeguard the civil rights of their students and employees, Title IX provides that they may lose the funds supplied by a myriad of federal agencies. *The creation of this incentive indicates that Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions.* . . . This indication is strengthened by the fact that Title IX gives plaintiffs access to the full panoply of judicial remedies. The provision of these remedies suggests that Congress saw Title IX as the device for redressing *any grievance* arising from a violation of federal civil rights by an educational institution. *Waid*, 91 F.3d at 862-863 (emphasis added).

The Sixth and Tenth Circuits have rejected this notion. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (refusing to apply *Middlesex* doctrine to independently existing federal constitutional rights and finding Title IX contains no comprehensive enforcement scheme); *Seamons v. Snow*, 84 F.3d 1226, 1234 n.8 (10th Cir. 1996) (following *Lillard*, but recognizing that the Section 1983 claim could not be predicated on a violation of Title IX itself, as "such a duplicative effort would be barred").

The Public School Employees believe, as urged in the proceeding below, that the reasoning of the Third and Seventh Circuits applies.

Title IX contains a comprehensive enforcement scheme, and gives plaintiffs a "full panoply" of judicial remedies. *Waid*, 91 F.3d at 863. When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, no Section 1983 action will lie. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20. This Court recog-

nized in *Franklin v. Gwinnett County Pub. Schools*, that all available remedies could be pursued by private enforcement of Title IX. *Id.*, 503 U.S. at 72. The availability of a private right of action and unlimited remedies available thereunder demonstrate Congress' intent to foreclose Section 1983 suits to enforce the provisions of Title IX. *See Middlesex*, 453 U.S. at 20-21; *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d at 789; *Bougher v. Univ. of Pittsburg*, 713 F.Supp. 139, 145 (W.D. Penn. 1989), *aff'd* 882 F.2d 74 (3d Cir. 1989).[5]

Given the intolerable conflict among the circuits that pervades decisions on this issue, this petition should be granted.

II. THE NINTH CIRCUIT'S OPINION DIRECTLY CONTRADICTS THIS COURT'S MANDATE IN *SIEGERT v. GILLEY* AND INVOLVES AN ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Public School Employees are entitled to qualified immunity if the complaint fails to state a federal claim *or* if in light of clearly established principles governing their conduct, the Public School Employees objectively could have believed their conduct was lawful. *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (*en banc*) (*citing Siegert v. Gilley*, 500 U.S. at 232). The Ninth Circuit's failure to address the underlying question (whether a cognizable claim exists) represents a clear departure from the accepted and usual course of judicial proceedings, on an issue which has not been, but should be, settled by this Court; thus, *certiorari* is appropriate.

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[5] The District Court opinion dismissed these cases as pre-*Franklin* rulings. However, *Franklin* did not discuss whether Section 1983 was available as a vehicle to enforce Title IX, and therefore, the holding of *Franklin* did not affect the consensus of these cases that a Section 1983 action will not lie when that action is derived from alleged violations of Title IX.

A. *Siegert v. Gilley* Analysis Step One: Is There a Federal Constitutional or Statutory Right to Sue Individuals Under Section 1983 for Violations of Title IX

The decision below assumes, without any discussion or citation to authority, that the school employees can be sued for a Title IX violation through the vehicle of Section 1983. The Ninth Circuit's omission of the first step of the *Siegert* analysis (*see Siegert*, 500 U.S. 226, 232-233) has potentially far-reaching ramifications to *any* discussion of qualified immunity, and sets a dangerous precedent for qualified immunity jurisprudence in general.

The Ninth Circuit has routinely applied the *Siegert* analysis to interlocutory appeals based upon the defense of qualified immunity. It has repeatedly stated that the first step of such an analysis requires a determination whether the claimant has stated a cognizable federal claim in the first instance. *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (*en banc*); *Allen v. Sakai*, 48 F.3d 1982, 1090 (9th Cir. 1994); *see also Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991). Despite this authority, the decision below fails to address the first step in its qualified immunity analysis when it assumes, without comment or authority, that violations of Title IX are enforceable against individuals through the vehicle of Section 1983. The Ninth Circuit panel, instead, focused on the second step of the *Siegert v. Gilley* analysis in deciding whether the law was clearly established in the 1992-1993 school year such that the Public School Employees could be held liable for peer sexual harassment.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, this Court held that Title IX, through an implied private right of action, may support a claim for monetary damages against a District receiving federal funds if the District discriminates against a person based on sex. Since the *Franklin* decision was issued, the circuits have strug-

gled with understanding the full implications of the "private right of action" recognized in *Franklin*. Title IX, by its own terms, indicates that an implied private right of action for damages may be maintained, if at all, only against educational institutions receiving Federal financial assistance. No court has held that Title IX creates liability on the part of individuals. *Cannon v. Univ. of Chicago*, 441 U.S. at 695 n.17; *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988). In *Floyd v. Waiters*, 133 F.3d 786, 789 (11th Cir. 1998) (*petition for cert. filed*, April 20, 1998), the court explained that because the contracting party under Title IX is the grant recipient, a "Title IX claim can only be brought against a grant recipient [—that is, a local school district—] and not an individual." *Id.* (brackets in original) (*quoting Smith v. Metro. School Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997) (*reh'g and suggestion for reh'g en banc denied*, Dec. 16, 1997) (*petition for cert. filed*, Mar. 16, 1998)).

The opinion below recognized that its jurisdiction was controlled by the only other Ninth Circuit opinion to address a Section 1983 cause of action arising from an alleged violation of Title IX: *Doe v. Petaluma City School Dist.*, 54 F.3d 1447 (9th Cir. 1995). However, the *Petaluma City* panel similarly declined to determine the underlying issue of whether an individual can be sued for a Title IX violation using the vehicle of Section 1983. *Id.* at 1449.

B. *Siegert v. Gilley* Analysis Step Two: Was the Law Clearly Established and Application of the Heightened Pleading Standard

Assuming, *arguendo*, the existence of a federal right to sue individuals under Section 1983 for violations of Title IX, then an essential subsidiary issue is raised regarding the second step of *Siegert v. Gilley* qualified immunity analysis: was the law clearly established in the 1992-

1993 school year such that the Public School Employees could be held individually liable for violations of Title IX because of failure to prevent teacher-student harassment and/or student-student harassment. Intentional discrimination under Title IX and alleged equal protection violations require a plaintiff to meet the heightened pleading standard. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994) (heightened pleading standard applies to each defendant's claim of qualified immunity).

A related subsidiary question (Sup.Ct.Rule 14.1(a)) is whether the opinion below properly applied the heightened pleading standard announced by the Ninth Circuit in *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991). The heightened pleading standard adopted by the Ninth Circuit in *Branch* requires respondent to state *nonconclusory* allegations, setting forth *evidence* of unlawful intent, in cases in which subjective intent is an element of the constitutional tort action. *Branch v. Tunnell*, 937 F.2d at 1386. Bare allegations of intent do not satisfy the standard adopted in *Branch*. "The allegations of fact must be specific and concrete enough to enable the defendants to prepare a response and where appropriate, a motion for summary judgment based on qualified immunity." *Ibid.* This Court has held that, as against municipalities, a form of heightened pleading is not required. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In doing so, however, this Court declined to address the propriety of the heightened pleading standard as it applies to the allegations brought against individual defendants. *Id.* at 166-67.

Insofar as respondent's Section 1983 claim arises from an alleged violation of the equal protection clause as well as directly from Title IX, the allegations against the school employees fail to meet the heightened pleading standard. The decision below contains no analysis of the factual

allegations supporting the Section 1983 claims against the Public School Employees, except to reference the bare, conclusory allegation that "[h]ere, Oona alleges that defendants intentionally discriminated against [her] because of gender . . .". (App. A, p. 6a.) Although application of the heightened pleading standard was urged by the Public School Employees in every step of the procedural history concerning their motion to dismiss, it was not given any consideration by the Ninth Circuit.

III. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE ELEVENTH AND FIFTH CIRCUITS IN APPLYING TITLE VII STANDARDS TO TITLE IX CLAIMS

In holding that failure to prevent student-student harassment violates Title IX, the decision below is in direct conflict with the Fifth Circuit (*Rowinski v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996)) and the Eleventh Circuit (*Davis II*, 120 F.3d 1390, 1406 (1997) (*en banc*) (*petition for cert. filed*, Nov. 19, 1997)). Both circuits explicitly refused to analogize Title IX to Title VII in determining whether school officials have a duty, pursuant to Title IX, to stop peer sexual harassment.

The Eleventh Circuit, in *Davis II*, relying on part on an extensive analysis of the legislative history of Title IX, concluded that Title IX was enacted under Congress' power to spend for the general welfare of the United States. *Davis II*, 120 F.3d at 1397-1398. As a Spending Clause enactment, Congress is required to give potential recipients of funding through Title IX unambiguous notice of the conditions they are assuming when they accept federal funding. *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). *Davis II* concluded that a Title VII analogy, which is dependent upon agency principles in general, is

inappropriate for application in a school setting for a student-student harassment. *Davis II*, 120 F.3d at 1399 n.13.[6]

Similarly, the Fifth Circuit in *Rowinski* declined to apply a Title VII case analysis to a student-student harassment claim under Title IX for the proposition that a hostile environment created by students is prohibited discrimination under Title IX. *Rowinski*, 86 F.3d at 1016. *See also, Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648, 654-658 (5th Cir. 1997) (refusing to apply agency principles to context of Title IX); *Smith v. Metro. School Dist. Perry Township*, 128 F.3d 1014, 1026 n.12 (following *Rowinski*).

Without exception, the circuits applying Title VII standards to Title IX claims do so in reliance upon this Court's reference to a Title VII case within the *Franklin* opinion. Unfortunately, the reference in *Franklin* to *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) is routinely given far more importance and greater scope than warranted. Until the confusion among the circuits is resolved by this Court, the reference portends significant risk of substantial damage awards against public school districts.

The reference appears in this Court's brief discussion of points raised by the respondents in *Franklin* as to whether Title IX was enacted pursuant to the Spending Clause, and if so, whether the remedies were limited to those situations where the violations were unintentional. In rejecting this proposition, this Court stated:

> The point of not permitting money damages for an unintentional violation is that the receiving entity of federal funds lack notice that it will be liable for a monetary award. [Cite.] This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX

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[6] One of the Questions Presented in the Petition for Writ of Certiorari in *Davis II* is whether the Title VII analogy was appropriate (*petition for cert. filed*, November 19, 1997).

> placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sev. Bank, FSB v. Vinson*, 477 U.S. 57, 64 [ ] (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. *Franklin*, 503 U.S. at 74-75.

Based on this reference to *Meritor*, cases have adopted Title VII jurisprudence to an alarming extent in Title IX cases. As correctly stated by the Seventh Circuit: *"Franklin* did not consider, much less hold, whether . . . agency principles in general should apply in Title IX cases." *Smith*, 128 F.3d at 1022.

Title VII prohibits sexual harassment as a form of sex discrimination by "employers." Title IX prohibits sex discrimination by "recipients of funds for a program or activity." However, the similarities between the statutes extend no further. *Smith*, 128 F.3d at 1023 (Title VII defines employers to include "any agent of such a person" (42 U.S.C. § 2000e(b)), while Title IX does not include such language). "Title VII and Title IX are worded differently. If Congress wished Title IX to be interpreted like . . . Title VII, Congress would have written Title IX to read like Title VII." *Davis II*, 120 F.3d at 1400 n.13.

In *Franklin*, this Court adopted *Pfeiffer's* reasoning that Title IX was patterned after Title VI. *Pfeiffer*, 917 F.2d at 787-88. This further suggests that the present split in the circuits should be resolved in favor of the position advocated by the Public School Employees: Title VII standards do not provide an appropriate analogue for claims brought pursuant to Title IX.

IV. FRANKLIN DID NOT CLEARLY ESTABLISH THAT INDIVIDUAL PUBLIC SCHOOL EMPLOYEES COULD BE LIABLE FOR MONEY DAMAGES UNDER TITLE IX FOR HARASSMENT BY THIRD PARTIES

The sole ground for the Ninth Circuit's denial of the Public School Employees' qualified immunity defense turns on a tangled and expansive reading of this Court's decision in *Franklin*. *Franklin* cannot be read so broadly.

Guided by its decision in *Doe v. Petaluma City School Dist.*, 54 F.3d at 1451, in which the Ninth Circuit held school officials' duties under Title IX were not clearly established in 1990, the majority decision below held: "Because *Franklin* was decided in February 1992, and the conduct here complained of began in October 1992, . . . the holding adumbrated by the majority in *Franklin* is required today: Title VII standards apply to hostile environment claims under Title IX. . . . Accordingly, we hold that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in Oona's class." (App. A, p. 8a-9a.)

Franklin did not address either factual issue involved in this case (individual liability of school officials for harassment of student by a teacher or by other students). *Franklin* involved the availability of money damages against a district which knew that one of its agents was having coercive intercourse with a female student *over a two-year period*; individual liability and intermittent peer harassment were not issues. The Public School Employees are highly skeptical that an adumbrated holding of the *Franklin* decision is that the Public School Employees are not entitled to qualified immunity (also not an issue in *Franklin*) for claims brought against them.

The Ninth Circuit recognized in *Doe v. Petaluma City School Dist.*, that the first case to address peer harass-

ment at all was the District Court opinion appealed in *Petaluma City* in May of 1994. *Petaluma City,* 54 F.3d at 1450 ("In fact, this case appears to be the first in which a student has sought money damages for peer harassment from either a school or school official."). It went on to state: "If the law at [the time of the official's actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* at 1450, *citing Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

Applying the analysis provided in *Petaluma City* to the facts of this case, there can be no liability against the Public School Employees for their alleged failure to prevent peer sexual harassment. Determining the relevant time frame is critical. The conduct in *Petaluma City* occurred prior to February, 1992, while the conduct alleged by respondent in this action occurred during the 1992-1993 school year. The only case discussing Title IX liability between February, 1992, and the end of the 1992-1993 school year was the Supreme Court decision *Franklin v. Gwinnett County Pub. Schools. Franklin* did not address this issue.

Even before the Ninth Circuit overturned the *Petaluma City* District Court decision in 1995, courts across the country found that a school official could *not* be held individually liable for failing to prevent peer harassment. *See Aurelia D. v. Monroe County Bd. of Educ.,* 862 F.Supp. 363, 367 (M.D. Ga. 1994) (*aff'd* 120 F.3d 1390); *Rosa F. Garza v. Galena Park Indep. School District,* 914 F.Supp. 1437 (S.D. Tex. 1994). During the 1992-1993 school year, there was no clearly established law which could have apprised the Public School Employees of a duty to intervene on respondent's behalf to prevent peer harassment.

By a 2-1 decision, the Ninth Circuit stands alone in imposing a threat of liability on public school employees. The majority of federal appellate justices have declined to place such burden on our nation's public educational system, recognizing the far-reaching and potentially devastating impact such liability would visit upon this institution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16046
D.C. No. CV-94-00623-TEH
(Northern California)

OONA, R.-S.-, a minor, by KATE S., her guardian,
KATE S. and KEN R.,
Plaintiff-Appellee,

v.

PATRICIA MCCAFFREY; GERALD HILL; RONALD LUNDY,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge Presiding

Argued and Submitted
October 8, 1996—San Francisco, California
Filed August 13, 1997
Amended August 25, 1997
Opinion withdrawn April 24, 1998

Order and Opinion Filed April 24, 1998
Amended May 5, 1998

Before: Harlington Wood, Jr.,* Mary M. Schroeder, and Cynthia Holcomb Hall, Circuit Judges

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Opinion by Judge Schroeder; Partial Concurrence and Partial Dissent by Judge Hall

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ORDER

The order and opinion filed April 24, 1998, are amended as follows:

Page 3791, last line, change "appellees" to "defendants-appellants."

Page 3793, second paragraph, line 5, change "appellees" to "defendants".

Page 3793, third paragraph, line 4, change "appellees" to "defendants".

Page 3798, line 11 from the top, change "appellees" to "defendants".

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

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* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, sitting by designation.

OPINION

SCHROEDER, Circuit Judge:

This is an interlocutory appeal testing the district court's denial of qualified immunity to school district officials in a 42 U.S.C. § 1983 action. The suit was filed by a female student claiming school officials were responsible for permitting sexual harassment by a student teacher and by boys in her class. We must decide whether the district court correctly determined that the duty imposed on school officials by Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 *et seq.* (as amended), to prevent sexual harassment of students was clearly established when the harassment in this case allegedly occurred during the 1992-93 school year. *See Oona R.-S. v. Santa Rosa City Schools,* 890 F. Supp. 1452, 1472-73 (N.D. Cal. 1995).

BACKGROUND

The plaintiff-appellee, Oona R.-S., was in the sixth grade at J.C. Fremont Elementary School in the Santa Rosa School District in California in 1992-93. She filed this action in February of 1994 against the school district, as well as individual school officials, including her teacher, Patricia McCaffrey; the school principal, Gerald Hill; and the Director of Elementary Education, Ronald Lundy. The individual officials are the defendants-appellants here.

The complaint alleged facts that the district court determined were sufficient to make out a claim of intentional discrimination on the basis of gender on the part of the principal, teacher, and director. The complaint contained allegations of failure to remedy sexual harassment from two different sources. The first was the failure to take steps to remedy inappropriate conduct by a student teacher. The second was the failure to take steps to address adequately the hostile environment created by the male students in Oona's class. The nature of the allegations are

described fully in the district court opinion, *see* 890 F. Supp. at 1456-57, and we merely sketch them here.

The student teacher, Ibach, allegedly fondled, kissed, straddled and otherwise inappropriately touched Oona and other students during October of 1992. He also allegedly called Oona "Oona Noodles." The complaint alleged that some of this inappropriate conduct actually took place in the presence of the teacher and principal, and that Oona's parents had demanded on October 16 that the principal remove Ibach from the classroom, which he refused to do. The complaint further alleged that upon noticing that Ibach was still on the school grounds on October 29, the parents confronted director Lundy, three days later. At that time, Lundy alleges, he told them that Ibach had been removed, and that his continued presence on October 29 had been unauthorized. However, beyond that, Lundy was uncooperative in dealing with the concerns of Oona's parents.

The harassment by male students allegedly occurred throughout the fall and winter of the school year. Boys allegedly referred to girls' body parts as "melons" and "beavers," called the girls slang terms for whores, and persisted in other types of offensive behavior. According to one particularly disturbing allegation, a boy struck Oona in the face and told her to "Get used to it." After the parents complained to Lundy and Hill, teacher McCaffrey allegedly retaliated against Oona by lowering her grade; when Oona's mother filed a tort claim against the district, the teacher allegedly retaliated further by, inter alia, withholding awards Oona had won. Oona's parents removed her from the school at the end of the school year and began home schooling.

The school district did not dispute that the complaint stated a claim against the district for violation of Title IX. The individual defendants moved to dismiss the claims brought against them under § 1983, and the district court

denied the motions of these defendants. *Oona,* 890 F. Supp. at 1473. This appeal followed.

In ruling on the motions to dismiss, the district court decided a number of issues. The only one before us in this appeal, however, is whether it correctly determined that the individual defendants were not entitled to immunity, because in 1992-93 reasonable school officials would have known that the conduct alleged by plaintiff would violate plaintiff's federal rights. *Oona,* 890 F. Supp. at 1472.

JURISDICTION

Our decision in *Doe v. Petaluma Sch. Dist.,* 54 F.3d 1447 (9th Cir. 1995), controls the scope of our jurisdiction. In *Petaluma,* we considered a § 1983 sexual harassment case that was in the same procedural posture as this one. A school counselor appealed from an order denying him qualified immunity on the ground that his alleged conduct in failing to take steps to stop sexual harassment violated clearly established rights under Title IX. In addition to seeking review of that determination, the counselor in *Petaluma* asked us to consider further whether he, as an individual, could be sued under § 1983 for violations of Title IX, or whether a suit against the school district itself was the exclusive remedy available for such violations.

We expressly declined to consider the latter question in *Petaluma,* holding that our review was limited to considering whether the law allegedly violated, i.e. Title IX's protection against hostile environment sexual harassment in schools receiving federal aid, was clearly established at the time of the conduct in question. We said that in reviewing a denial of qualified immunity, this court has jurisdiction " 'only to decide if defendant's conduct violated . . . clearly established [law.]' " *Petaluma,* 54 F.3d at 1449 (quoting *Pelletier v. Federal Home Loan Bank,* 968 F.2d 865, 871 (9th Cir. 1992). We accordingly

conclude that our review in this case is limited to the issue of whether the federal rights here asserted were clearly established in the 1992-93 school year, which is a question of law to be reviewed de novo. *See Petaluma,* 54 F.3d at 1449. *See also Mitchell v. Forsyth,* 472 U.S. 511, 530 (1985) (denial of qualified immunity is an appealable decision to the extent that it turns on an issue of law). It is to that issue that we now turn.

DISCUSSION

Equal Protection

The Equal Protection Clause creates the right to be free from any purposeful sex discrimination by state actors. This court has rejected a defendant's claim of qualified immunity in a § 1983 claim claiming sex discrimination as a violation of the Equal Protection Clause. *Lindsey v. Shalmy,* 29 F.3d 1382 (9th Cir. 1994). The discriminatory conduct at issue in *Lindsey* took place in 1988, and the court concluded that "[w]ell prior to 1988 the protection afforded under the Equal Protection Clause was held to proscribe any purposeful discrimination by state actors, be it in the workplace *or elsewhere,* directed at an individual solely because of the individual's membership in a protected class." *Id.* at 1386 (citing *Washington v. Davis,* 426 U.S. 229, 239 (1976)) (emphasis added).

Thus, the right to be free from intentional gender discrimination by a state actor was clearly established as early as 1988. Here, Oona alleges that defendants intentionally discriminated against Oona because of her gender in the school year of 1992-93. Defendants are not entitled to immunity from Oona's Equal Protection claim.

Title IX

The pertinent provision of Title IX provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the

> benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a).

In *Petaluma* we considered a claim that a school counselor had violated Title IX in failing to take steps to stop peer sexual harassment of a student in 1990. *Petaluma*, 54 F.2d at 1451. Although we recognized that an employer's duty under Title VII to remedy peer sexual harassment in the workplace was clear, the majority held that there was no clearly established law imposing a similar duty for school officials under Title IX because courts had, as of 1990, not yet treated the Titles as analogous for purposes of sexual harassment claims. *Id.* at 1452.

The Supreme Court made such an analogy in 1992, however, when it likened the duties of a school district to remedy sexual harassment under Title IX, to the Title VII duties of an employer. In *Franklin v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992), the Court said:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student.

Franklin, 503 U.S. at 75. *Meritor* is, of course, the lead Supreme Court case recognizing that an employer may be liable for sexual harassment that creates a hostile work environment. By citing it with approval in the Title IX context, to define the critical concept of discrimination on the basis of sex, the Supreme Court in *Franklin* was

analogizing the duties of school officials to remedy known sexual harassment under Title IX, to those of employers under Title VII.

Several circuits, following *Franklin,* have applied Title VII principles to hostile environment claims under Title IX. The Eighth Circuit, in *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463, 469 (8th Cir. 1996), noted that same sex harassment was actionable under Title VII and wrote "[w]e see no reason to apply a different standard under Title IX." *Id.* at 468. Likewise, the Sixth Circuit held that "a 'hostile environment' sexual harassment claim is cognizable under Title IX," and that Title VII principles guide resolution of such a claim. *Doe v. Claiborne County,* 103 F.3d 495, 514-15 (6th Cir. 1996) (citations omitted).

Moreover, two circuits have held, as we do, that plaintiffs may state hostile environment claims for student-to-student harassment, as well as teacher-to-student harassment. The Seventh Circuit in *Doe v. University of Illinois,* No. 96-3511, 1998 WL 88341, at *8 (7th Cir. Mar. 3 1998), held that school officials are not immune for their "failure to take prompt, appropriate action in response to student-on-student sexual harassment. . . ." The Fourth Circuit in *Brzonkala v. Virginia Polytechnic Inst.*, 132 F.3d 949, 957 (4th Cir. 1997), *reh'g en banc granted* (Feb. 5, 1998), though not dealing with immunity, considered the school's duties to remedy known peer harassment under Title IX to be the same as that of an employer's under Title VII.

In *Petaluma,* when we held that the school officials' duties were not clearly established in 1990, we noted the Supreme Court's 1992 *Franklin* decision and recognized that the result might well be different in a claim of immunity for conduct that occurred after *Franklin* was decided. Because *Franklin* was decided in February 1992, and the conduct here complained of began in October 1992, this is such a case. The holding adumbrated by

the majority in *Franklin* is required today: Title VII standards apply to hostile environment claims under Title IX. We expressly recognized that hostile environments include peer harassment in *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991). Accordingly, we hold that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in Oona's class.

We are aware that the law is different in other circuits. The Eleventh Circuit in *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *reh'g en banc granted*; *opinion vacated*, 91 F.3d 1418 (1996), originally held that similar allegations, that the school board knowingly permitted another student's sexual harassment to create a hostile environment, stated a violation of Title IX duties. After en banc review, it held the allegations did not state such a violation. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (en banc). The Fifth Circuit has held that Title IX does not impose liability on a school district for peer hostile environment sexual harassment, absent allegations that the school district itself discriminated based on sex, e.g., by correcting only harassment of boys and not of girls. *See Rowinsky v. Bryan Indep. Sch. Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996).

We have difficulty squaring the reasoning of those cases with the Supreme Court's in *Franklin* and our own in *Petaluma*. *Rowinsky* and *Davis* imply that school officials, differ from employers, and should not be vicariously liable for the actions of peers under agency principles. But neither the employers under Title VII, nor the school officials under Title IX, are vicariously liable for the actions of others. Rather, they are liable for their own discriminatory actions in failing to remedy a known hostile environment. Thus, Oona seeks only to hold the school liable for its own failure to address adequately a known hostile environment. Accordingly, the district court cor-

rectly held that the individual defendants were not entitled to qualified immunity from Oona's peer harassment claim under Title IX.

We stress that the issue before us is narrow. We do not consider what steps school officials may reasonably be required to take to address harassment by fellow students, or when they are required to take them. Hence, we do not consider the extent to which such action may differ from the action reasonably expected of employers to remedy harassment by fellow employees. We hold only that in this circuit the duty to take reasonable steps to remedy a known hostile environment created by a peer is clearly established. Parents have long had a right to expect school officials to do what they reasonably can to protect the children who are temporarily in their custody and to provide an appropriate learning atmosphere. The dissent's position that there is a duty under Title IX to remedy one type of sex discrimination but not another is contrary to controlling authority and to parents' expectations.

Defendants' conduct also violated Oona's clearly established rights under Title IX by failing to supervise Ibach. A supervisor may be found liable under § 1983 if the supervisor is "aware of a specific risk of harm to the plaintiff." *Ketchum v. Alameda County*, 811 F.2d 1243, 1247 (9th Cir. 1987). This court has also held that, as early as 1988, "complete inaction in the face of claimed harassment cannot be objectively reasonable conduct entitling a supervisor to qualified immunity." *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994) (denying qualified immunity in a § 1983 action where the violation took place in 1988).

Oona has alleged that defendants here, who were all in supervisory positions to Ibach, knew or had reason to know that Ibach sexually harassed, fondled, and inappropriately touched Oona. Ibach's alleged conduct of sexually harassing a student constitutes sex discrimination, in viola-

tion of Oona's federal rights under Title IX. *See Franklin,* 503 U.S. at 75. Thus, after *Franklin,* a school official in a supervisory position cannot claim immunity for the failure to respond to complaints of harassment and discrimination. Other circuits have reached this conclusion as well. *See Claiborne,* 103 F.3d at 515 (holding that elements to state a supervisory hostile environment claim under Title VII equally apply under Title IX); *Rosa H. v. San Elizario Indep. Sch. Dist.,* 106 F.3d 648, 660 (5th Cir. 1997) (finding Title IX liability for supervisory school officials with actual knowledge of sexual abuse or harassment). The allegations that defendants knew of Ibach's behavior and failed to prevent it are sufficient to show violations of clearly established Title IX rights during the 1992-93 year.

For the foregoing reasons, we AFFIRM the District Court's order denying qualified immunity to the defendants.

HALL, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's holding that the defendants are not entitled to qualified immunity on the plaintiffs' Title IX claim based on their failure to stop peer sexual harassment among students.

The only issue on appeal is whether the individual defendants are entitled to qualified immunity. The defendants are entitled to a dismissal based on qualified immunity "[u]nless the plaintiffs' allegations state a claim of violation of clearly established law." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985). "The standard for determining qualified immunity is objective. 'If the law at [the time of the official's actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said

to 'know' that the law forbade conduct not previously identified as unlawful.' " *Doe v. Petaluma City Sch. Dist.*, 54 F.3d 1447, 1450 (9th Cir. 1995) (citation omitted).

The majority holds that Oona's rights under the Fourteenth Amendment and Title IX were clearly established on the date of the alleged conduct and affirmed the district court's denial of qualified immunity. I disagree. The law does not clearly impose a duty under Title IX on school officials to stop peer sexual harassment. Therefore, the defendants are entitled to qualified immunity on this claim to the extent it relates to the Title IX peer harassment allegations.

There are no cases holding that students have a right under Title IX to be free from peer sexual harassment. Instead, the majority's determination that Title IX clearly protects students from peer harassment depends upon an analogy between Title VII and Title IX: Because peer harassment in the workplace is actionable unde. Title VII, *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991), therefore, peer harassment in schools is clearly actionable under Title IX.

It is correct that courts have applied Title VII principles in Title IX cases. Most significantly, in *Franklin v. Gwinnett County Pub. Schs.*, the Supreme Court relied on a Title VII case to find that Title IX protects students from teacher-student sexual harassment:

> Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.

503 U.S. 60, 75 (1992) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)); *see also Doe v.*

Claiborne County, 103 F.3d 495 (6th Cir. 1996) (adopting Title VII principles to recognize Title IX hostile-environment claim for teacher-student harassment); *Kinman v. Omaha Pub. Sch. Dist.*, 94 F.3d 463 (8th Cir. 1996) (borrowing from Title VII to find a Title IX right against same-sex teacher-student harassment).

The majority, relying on *Petaluma*, concludes that the Supreme Court in *Franklin* clearly established that Title VII rights are analogous to Title IX rights. Therefore, because peer harassment has been recognized under Title VII, the majority holds that peer harassment is clearly recognized under Title IX. I do not believe that *Petaluma* mandates this interpretation, nor do I believe that *Franklin* sweeps so broadly.

The facts and issues in *Petaluma*, a student peer harassment case, were almost identical to those in this case. The *Petaluma* court determined that a school counselor was entitled to qualified immunity because he did not have a clearly established duty to prevent peer sexual harassment under Title IX. The conduct in *Petaluma* arose before the Supreme Court's decision in *Franklin*; therefore, the court was unable to apply the ruling in *Franklin* to its decision. However, the court recognized,

> If [the counselor] engaged in the same conduct today, he might not be entitled to qualified immunity. We would then be required to consider the Supreme Court's recent *Franklin* decision. It might be that today a Title VII analogy likening [the counselor] to an employer and Doe to an employee might provide an argument to consider in a similar Title IX case. However, those arguments are not properly before us.

Petaluma, 54 F.3d at 1452. *Petaluma* properly declined to determine the reach of *Franklin*. Instead, it merely reminded the court that the effect of *Franklin* must be

considered in future Title IX peer harassment cases. This is such a case.

Franklin does not require this court to apply Title VII principles to all Title IX cases. It merely states that teacher-student harassment is sufficiently analogous to employer-employee harassment that "the same rule should apply." 503 U.S. at 75. However, the similarity between peer harassment among employees and peer harassment among students is not as clear: While schools do hire and fire their teachers, they do not hire and fire their students. Although an argument can certainly be made for applying Title VII principles to this Title IX case, the analogy is neither clear nor required by *Franklin*; therefore, qualified immunity should not have been denied with respect to the peer harassment. *See Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390, 1399-1400 n.13 (11th Cir. 1997) (en banc) (explicitly rejecting this analogy because "the Supreme Court has never discussed student-student sexual harassment or generally applied Title VII jurisprudence to [all] Title IX cases").

Based on the foregoing reasons, I respectfully dissent. At the time of the defendants' actions, the law did not clearly establish the defendants' duty under Title IX to stop peer sexual harassment among students.

APPENDIX B

[Filed May 22, 1998]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 95-16046
CT/AG#: CV-94-00623-TEH

R.S. OONA, a minor, by KATE S., her guardian,
KATE S. and KEN R.,
Plaintiff-Appellee

v.

PATRICIA MCCAFFREY; GERALD HILL; LARRY LUNDY,
Defendants-Appellants

Appeal from the United States District Court for the
Northern District of California (San Francisco)

JUDGMENT

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California (San Francisco) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is AFFIRMED.

Filed and entered April 24, 1998
Amended May 5, 1998

APPENDIX C

[Filed May 2, 1995]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

No. C 94-0623 TEH

OONA R.-S., a Minor, by KATE S., her guardian,
KATE S., and KEN R.,
Plaintiffs,

v.

SANTA ROSA CITY SCHOOLS, *et al.*,
Defendants.

ORDER

On November 14, 1994, the Court heard oral argument on motions to dismiss filed in this action by several individual school district employees (collectively "Defendants"), the Santa Rosa City School District, and Drew Ibach ("Ibach"). In an order issued on November 23, 1994, the Court ruled on several of those motions. The Court also ordered the parties to submit supplemental briefing on two issues related to Defendants' and Ibach's motions to dismiss plaintiffs' claims brought under 28 U.S.C. section 1983. All parties timely submitted these supplemental briefs.

Having reviewed the written and oral arguments submitted by the parties, and good cause appearing, the Court rules on the motions which remain pending before it as follows. Defendants' motion to dismiss is GRANTED IN PART AND DENIED IN PART, and Ibach's motion to dismiss is DENIED for the reasons explained below.

I. BACKGROUND

Plaintiff Oona R.-S. ("Oona") and her parents bring this suit against the Santa Rosa City School District ("District") and against several employees of the District for events which allegedly took place when Oona was an 11-year-old sixth grade student at J.C. Fremont Elementary School. Broadly, plaintiffs allege two types of culpable conduct on the part of defendants. First, plaintiffs allege that Drew Ibach, a student teacher assigned to the classroom of Patricia McCaffrey, Oona's teacher, sexually assaulted and harassed Oona and other female students on more than one occasion. The complaint further charges that the other defendant officials failed to take adequate steps to prevent Ibach's conduct. Second, plaintiffs allege that the defendant school officials and teachers created a hostile environment for female students, in large part by failing to prevent Oona's male peers from harassing her and other girls in her class.

1) Ibach's Conduct and Defendants' Responses

According to the complaint, one day in early October of 1992, Ibach approached Oona in the classroom while she was seated at her desk studying. Ibach sat down in a chair close behind Oona in such a manner that his legs were straddling her body, and spoke with Oona and another student while leaning over Oona's shoulder. When Oona moved her chair forward and away from Ibach, he also moved his chair forward and resumed the same position. Plaintiffs allege that this conduct was part of a pattern and practice on the part of Ibach during September and October of 1992 of staring at, winking at, whispering to, hugging, and otherwise inappropriately touching female students in McCaffrey's class. Plaintiffs further allege that some of this inappropriate conduct occurred in the presence of defendants McCaffrey and Gerald Hill, the school's principal.

On October 15, 1992, Ibach approached Oona on the playground and fondled Oona's buttocks while whispering

"Hi, Oona Noodles" in her ear. "Oona Noodles" was a nickname Ibach had given Oona earlier in the school year. Startled, Oona swung around, hitting Ibach on the arm. Because she was worried about getting into trouble for hitting Ibach, Oona did not report this incident to her teacher McCaffrey. After school, Oona told her mother, plaintiff Kate S., about the incident with Ibach. Kate S. called McCaffrey and told her what Oona had said, and requested that the school immediately remove Ibach from Oona's classroom. While maintaining that she could not believe Ibach could have done what Oona claimed, McCaffrey said that she would speak to Hill, the principal, about the matter the next day.

On October 16, Oona's father, plaintiff Ken R., met with Hill and requested that Ibach be removed from Oona's classroom. Hill refused on the ground that Oona's account of the incident was "unverified." Hill said that he had discussed Oona's allegations with Ibach and felt that Oona may have misinterpreted Ibach's intentions. Hill agreed, however, that there was no circumstance in which it was appropriate for a teacher to touch a student's buttocks. Ken R. told Hill that he did not want Oona and Ibach to be in the same classroom. Hill asked to discuss the matter further with Ken R. and Kate S. at some time within the next few days.

On October 18, Hill reiterated that Ibach would not be removed from McCaffrey's class, and suggested that Oona transfer to another sixth grade classroom. Oona's parents did not want to separate Oona from her friends in McCaffrey's class, however, and reluctantly agreed to allow Oona to remain in the classroom with Ibach.

A few days later, the mother of one of Oona's female classmates found her daughter crying in her bedroom and writing a letter to McCaffrey explaining that Ibach made the girls in the class very uncomfortable. The mother met with McCaffrey, who stated that the girl had been upset by a "lie" which Oona had told and subsequently "admitted" to McCaffrey. Unsatisfied, the mother told

McCaffrey that the situation seemed more serious than McCaffrey apparently perceived it to be.

Some time after this meeting, McCaffrey called in five to seven of Oona's classmates and questioned them, in defendant Hill's presence, about Ibach's behavior and their feelings toward Ibach. Oona was not present at this meeting. Plaintiffs allege that several of the girls reported that Ibach had behaved inappropriately toward them.

On October 29, Oona told her parents that she thought Ibach had been removed from McCaffrey's classroom. A day later, however, Oona informed her parents that Ibach had been seen back on school grounds during school hours. Ken R. and Kate S. made an effort to find out whether Ibach had been formally removed and, if so, why he had been seen on school grounds. They were unable, however, to obtain this information from the defendants.

Ken R. and Kate S. directly asked defendant Director of Elementary Education Ron Lundy on November 2 whether Ibach had been removed from his position as a student teacher at the school. Lundy responded that Ibach had been formally removed, and stated that Ibach's return to the school on October 30 had been unauthorized. Lundy said that the plaintiffs had not been informed of Ibach's removal because personnel matters were confidential. When Ken R. asked Lundy who plaintiffs should contact to discuss any other concerns or complaints which might arise with regard to Ibach, Lundy allegedly provided "no information" in response to Ken R.'s question.

2) Student-to-student harassment

Throughout the fall and winter of the 1992-1993 school year, McCaffrey allowed the students in her sixth grade class to watch MTV without adult supervision. While watching MTV, some of the boys in the class made loud and vulgar comments of a sexual nature about the women in the music video shown on the station.

In late February 1993, Oona told her parents that some boys in her class had repeatedly referred to girls' body parts as "melons" and "beavers." In a class meeting procedure designed to resolve student disputes, Oona had "written up" two of the boys for asking if she "had a beaver at home" and if she had "left her melons at home." The boys yelled out these statements in the vicinity of school employees including McCaffrey. At a meeting at which McCaffrey was present, Oona requested that the boys apologize and pay a fine in "funny money" under the class grievance procedure. The boys were fined $10.00 in funny money but not required to apologize.

On February 24, 1993, Oona's parents reported to McCaffrey and defendant Deputy Superintendent of Schools Larry White that Oona was being called a "ho" (a slang term for "whore") and a "lesbian" by the boys Oona had previously written up for calling her names. Neither McCaffrey or White, the complaint alleges, investigated this claim or took disciplinary action against the boys.

In early March, Oona told her parents that one of the boys that she had previously written up had struck her in the face and told her, "Get used to it." After this incident, Oona again wrote the boy up in the class log book. Ken R. immediately reported this occurrence to principal Hill, and plaintiffs allege that Lundy "was also informed" of this incident. No investigation of this claim was undertaken, and no disciplinary action was taken against the boy.

Also in early March, Ken R. and Kate S. received a letter from defendant Lundy indicating that Lundy, McCaffrey, and Hill had previously been unaware of any sexual harassment in Oona's classroom. A two-page pamphlet entitled "Sexual Harassment—Students" was enclosed with the letter. On March 29, Kate S. asked Lundy for information on the school district's sexual harassment

grievance procedure. She received no response to that request.

On March 30 and 31, Kate S. reported to the offices of Lundy and Hill that she objected to MTV being shown in McCaffrey's classroom due to its sexist content. Around April 1, McCaffrey informed the students in her class that they could no longer watch MTV because a parent had complained.

When report cards were issued on April 4, Oona received a "C–" in writing for the third quarter of the school year. Oona had received an "A–" in writing the previous quarter. Oona's grades for academic effort were also lower than they had been the semester before. Plaintiffs imply that the drop in Oona's grades was the result of retaliation by McCaffrey against Oona and was motivated by the complaints voiced by the plaintiffs.

On April 5, Kate S. told defendant Hill that a classmate of Oona's did not want to attend a field trip to a water park because boys in her class had called her "jello" (referring to her large breasts) and talked about her "beaver." Hill responded that Oona could transfer to any other elementary school in the district that she wanted to.

Kate S. filed a tort claim against defendants Santa Rosa City Schools, McCaffrey, Ibach, Hill, and Lundy on April 8.[1] On that date, Kate S. also filed a Discrimination Complaint Form with the Office for Civil Rights of the United States Department of Education. On April 9, Kate S. received a letter from defendant Deputy Superintendent Mel Solie accompanied by a seven-page document entitled "Sex Harassment."

After Kate S. filed these claims, plaintiffs allege that McCaffrey continued to retaliate against Oona. On April 23, McCaffrey refused to allow Oona to stay after school

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[1] This claim was rejected by Santa Rosa City Schools on August 24, 1993.

with other students to work on the school newsletter because no teacher would be present, telling Oona that "your mom wouldn't like you to be here unsupervised." A few days later, on April 26, McCaffrey cancelled a play in which Oona was to perform on the night of the 26th at an "Open House" at the school. None of the other events scheduled for the Open House were cancelled.

When the slapping incident which had occurred in early March came up for discussion on the class meeting log book on May 8, 1993, McCaffrey reprimanded Oona for writing the boy up rather than reporting the incident to McCaffrey immediately.[2] McCaffrey also criticized Oona's requested punishment as too lenient, and spoke with the boy privately for approximately 15 minutes. No disciplinary action followed this meeting. The next week, on May 10, Kate S. filed a report with the Santa Rosa Police against Ibach. No defendant had previously done so.

After the end of the school year, plaintiffs allege that McCaffrey engaged in one last act of retaliation. On July 9, Kate S. contacted the Gateway Reading Council, an organization which had selected Oona to receive a "Young Writers Award" the previous March, to ask why Oona had not yet received her award. Kate S. was informed that the prize, a book containing the stories written by Oona and other award winners, had earlier been sent to Oona's school for delivery to her. When Kate S. asked McCaffrey where the book had gone, McCaffrey said that she believed that she had thrown it away.

During the summer of 1993, plaintiffs decided to remove Oona from the Santa Rosa school system. Since that time, she has been schooled at home by her mother. On October 20, 1993, defendant District was informed

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[2] The Court urges plaintiffs to verify the accuracy of the date included in this allegation, as May 8, 1993 was a Saturday, meaning that school presumably was not in session that day.

that the Office for Civil Rights had reached a tentative finding that student-to-student harassment had occurred in McCaffrey's class, that this harassment had created a hostile environment for Oona, and that officials at the school knew or should have known of the harassment but failed to take timely, effective action to prevent it from continuing.

In the instant action, plaintiffs bring suit against the District and the individual defendants under a number of federal and state law theories, including the deprivation of rights secured by the Equal Protection Clause, the Due Process Clause, and Title IX, 20 U.S.C. § 1681. Defendants do not dispute that plaintiffs have properly stated a claim against defendant District for violation of Title IX, 20 U.S.C. § 1681, and its implementing regulations. Defendants move to dismiss plaintiffs' claims brought against the individual defendants under 28 U.S.C. § 1983, however, on the grounds that 1) an action against an individual District employee cannot properly be based on the alleged deprivation of a student's rights under Title IX; and 2) that even if the Court recognizes such a cause of action under section 1983, the conduct alleged by plaintiffs is insufficient to state a claim. The individual defendants also argue that they are entitled to qualified immunity, necessitating the dismissal of plaintiffs' section 1983 claims at this stage.

II. LEGAL STANDARD

Dismissal is appropriate under Rule 12(b)(6) when plaintiff's complaint fails to state a claim upon which relief can be granted. Fed.R.Civ.P. 12(b)(6). Dismissal may be based on the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990). The Court must accept as true the factual allegations of the complaint and indulge all reason-

able inferences to be drawn from them, construing the complaint in the light most favorable to the plaintiff. *Dodd v. Spokane County*, 393 F.2d 330, 334 (9th Cir. 1968); *NL Industries, Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986). The Court must construe the complaint liberally, and dismissal should not be granted unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Intake Water Co. v. Yellowstone River Compact Comm'n*, 769 F.2d 568, 569 (9th Cir. 1985), *cert. denied*, 476 U.S. 1163 (1986).

III. DISCUSSION

A. *Motions to Dismiss § 1983 Claims on Merits*

This case presents important issues regarding the viability of a cause of action against an individual state official under 42 U.S.C. § 1983 based on that official's alleged deprivation of rights conferred on a plaintiff by Title IX and the Fourteenth Amendment. No Supreme Court or circuit court decision of which this Court is aware has addressed the question of whether a cause of action will lie under section 1983 against a teacher or school official alleged to have engaged in or allowed the sexual assault and harassment of a student in violation of Title IX. Plaintiffs' suit therefore raises substantial questions of law and policy regarding the interaction between section 1983 and the substantive rights which it is intended to protect.

1. The Section 1983 Cause of Action

In order to state a claim under § 1983, a plaintiff must allege two elements: 1) the deprivation of a right secured by the Constitution or laws of the United States; and 2) that the alleged deprivation was committed by a person acting under the color of state law. *West v. Atkins*, 487 U.S. 42, 48 (1988). *Respondeat superior* is not a sufficient basis for imposing § 1983 liability. *Monell v. Depart-*

ment of Social Servs., 436 U.S. 658, 663-64 n.7 (1978); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680 (9th Cir. 1984). Instead, in order to state a claim under § 1983, a plaintiff must allege facts to show that the defendant 1) personally deprived the plaintiff of a protected right; or 2) in a supervisory capacity, took culpable action or wrongfully failed to act in the training, supervision, or control of his subordinates, acquiesced in the constitutional deprivations complained of, or engaged in conduct demonstrating a "reckless or callous indifference to the rights of others," or 3) was responsible for an official policy or custom which resulted in the violation. *Ybarra*, 723 F.2d at 680-81; *Larez v. Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citations omitted).

In this case, it is undisputed that the alleged actions and/or failures to act attributed to the individual defendants, a public school teacher, a student teacher, and several administrators, occurred under color of state law. *See Doe v. Taylor Indep. Sch. Dist.*, 15 F.3d 443, 452 n.4 (5th Cir. 1994), *cert. denied*, 115 S.Ct. 70 (explaining that where a " 'real nexus' exists between the activity out of which the violation occurs and the teacher's duties and obligations, then the teacher's conduct is taken under color of state law"). The sole issue before the Court, therefore, is whether each named defendant deprived Oona of a constitutional or federal statutory right within the meaning of controlling precedent.

2. The Relationship Between Section 1983 and Title IX

    a. Does Title IX create a right enforceable under 1983?

Title IX of the Educational Amendments of 1972 provides that:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied

> the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . .

20 U.S.C. § 1681(a).

The central questions raised by defendants' motion to dismiss concern whether Title IX creates a right enforceable by plaintiffs under section 1983 here and, if so, whether plaintiffs have alleged facts sufficient to state a section 1983 claim against any or all of the defendants.

Well-settled Supreme Court precedent establishes that a right of action under section 1983 will lie only where 1) the underlying substantive statute at issue creates "enforceable rights," and 2) Congress has not foreclosed private enforcement through section 1983 in the statute itself. *Wright v. Roanoke Redevelopment and Hous. Auth.*, 479 U.S. 418, 423 (1987) (explaining that section 1983 provides a remedial cause of action for a state actor's deprivation of a right secured by a federal statute "unless the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement"); *Pennhurst State Sch. & Hospital v. Halderman*, 451 U.S. 1, 28 and n.21 (1981); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1, 19 (1981).

Similarly, the Ninth Circuit has held that "at least the existence of a federal right . . . is required in order to support a section 1983 action." *Boatowners and Tenants Ass'n v. Port of Seattle*, 716 F.2d 669, 673 (9th Cir. 1983). The *Boatowners* court applied the analysis set out in *Cort v. Ash*, 422 U.S. 66, 78 (1975), in which the Supreme Court held that a "statute create[s] a federal right in favor of the plaintiff" where the plaintiff is "one of the class for whose *especial* benefit the statute was enacted." *Id.* at 672 (quoting *Cort* at 78) (emphasis in original). *Boatowners* further noted that application of the *Cort* analysis "requires not only a consideration of

whether the plaintiff is a member of the class for whose benefit the statute was enacted, but also whether 'Congress intended to confer federal rights upon those beneficiaries.'" *Id.* at 672-73 (quoting *Fisher v. City of Tucson*, 663 F.2d 861, 863 (9th Cir. 1981)). *Boatowners* noted that "the special benefit test is satisfied where the statute places 'unmistakable focus on the benefitted class.'" *Id.* at 673 n.5 (quoting *Limongelli v. Postmaster General*, 707 F.2d 368, 371 (9th Cir. 1983)).

The Court believes it indisputable that Title IX confers an enforceable right upon plaintiff Oona here within the meaning of *Boatowners*. Title IX unequivocally states that "no person" may lawfully be discriminated against or otherwise disadvantaged on the basis of her gender under the auspices of certain educational programs, and the Supreme Court has viewed such language as "dispositive" of the question whether Congress intended to vest an enforceable federal right in individuals claiming to have been so treated. *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 (1979). Because plaintiff alleges that she has been discriminated against on the basis of sex, her claim implicates a substantial federal right which is enforceable under section 1983, provided the second prong of the *Boatowners* test is met. *See Cannon*, 441 U.S. at 694 ("Title IX explicitly confers a benefit on persons discriminated against on the basis of sex, and petitioner [alleging that she was excluded from participation in a medical education program because of her sex] is clearly a member of that class for whose special benefit the statute was enacted.").

As to the second issue identified by the Supreme Court, the question of whether Congress intended to preclude enforcement of a particular right under section 1983, the Court finds nothing in the language of Title IX which reflects such intent on the part of Congress. Section 1983 provides a remedial cause of action for a state actor's deprivation of a right secured by a federal statute "unless

the state actor demonstrates by express provision or other specific evidence from the statute itself that Congress intended to foreclose such private enforcement." *Wright*, 479 U.S. at 423. Where " 'the remedial devices provided in a particular Act are sufficiently comprehensive . . . to demonstrate Congressional intent to preclude' a Section 1983 remedy," no such claim will lie. *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1470 (9th Cir. 1984), *citing Middlesex County Sewerage Auth. v. Nat'l Sea Clammers*, 453 U.S. 1, 20 (1981). The state actor bears the burden of proving that Congress intended to foreclose a private right of action under the statute establishing the right. *Wright*, 479 U.S. at 423.

The Supreme Court's decision in *Cannon* established that Title IX does not expressly foreclose a private right of action. 441 U.S. at 717. Defendants argue, however, that the remedial scheme created by Title IX is "sufficiently comprehensive" to demonstrate Congress' intent to preclude a section 1983 remedy.

The Court finds that defendants have not met their burden of showing that Title IX's remedial devices are sufficiently comprehensive to demonstrate Congress' intent to preclude enforcement of rights created by Title IX under section 1983. The *Cannon* Court, having thoroughly analyzed the legislative history of Title IX, directly addressed the lack of comprehensiveness of the enforcement scheme under that statute:

> [The Court has] never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute. . . . As the Government itself points out in this case, Title IX not only does not provide such a mechanism, but the complaint procedure adopted by [the agency responsible for enforcement of the statute at that

> time] does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.

441 U.S. at 706 n.41 (citations omitted).

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 112 S.Ct. 1028 (1992), the Supreme Court reaffirmed the holding of *Cannon* in finding that the remedy of damages is available in an action brought to enforce Title IX, even though the statute does not explicitly authorize an award of damages. The *Franklin* Court analyzed two Congressional amendments to Title IX enacted after the *Cannon* decision and concluded that "Congress did not intend to limit the remedies available in a suit brought under Title IX." 112 S.Ct. at 1036. The *Franklin* decision, therefore, constitutes strong evidence that the Supreme Court still would not consider the enforcement structure of Title IX to be sufficiently comprehensive to preclude the enforcement under section 1983 of rights created by Title IX.

Defendants present no evidence that Title IX's enforcement scheme has changed since the *Cannon* decision in 1979. Moreover, the lower court cases cited by defendants were all decided before the Supreme Court's recent holding in *Franklin* implicitly rejected the position that the remedial mechanism provided in Title IX is so comprehensive as to preclude any other remedies, including the enforcement of Title IX rights under section 1983.[3] In

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[3] Defendants cite *Pfeiffer v. Marion Ctr. Area Sch. Dist.*, 917 F.2d 779 (3d Cir. 1990), *Mabry v. State Bd. for Community Colleges and Occupational Educ.*, 597 F.Supp. 1235 (D. Colo. 1984), *aff'd on other grounds*, 813 F.2d 311 (10th Cir. 1987), *cert den.* 484 U.S. 849, and *Bougher v. Univ. of Pittsburgh*, 713 F.Supp. 139 (W.D. Pa. 1989), *aff'd on other grounds* 882 F.2d 74 (3d Cir. 1989). However, not only were these cases decided before the

light of the Supreme Court's assessments in *Cannon* and *Franklin* of the limited preclusive significance of Title IX's enforcement mechanisms, therefore, the defendants have not met their burden of showing that the remedial scheme under Title IX is sufficiently comprehensive to preclude plaintiffs from maintaining a section 1983 claim based on alleged violations of Title IX.

Because Title IX creates an enforceable right and the statute does not reflect Congress' intent to preclude plaintiffs from enforcing that right by way of section 1983, therefore, the Court finds that a section 1983 action may properly be based on alleged violations of Title IX. That holding does not conclude the Court's task here, however, for it remains to be determined whether the conduct alleged by plaintiff amounts to a deprivation of a right secured by Title IX within the meaning of relevant precedent. *See Hill v. Ibarra*, 954 F.2d 1516, 1522 (10th Cir. 1992) (noting that it is "self-evident . . . that a § 1983 claim premised upon rights created in another federal statute cannot survive the failure to establish a violation of the latter").

b. Deprivation of any Title IX right?

As noted above, Title IX states that "[n]o person . . . shall, on the basis of sex, be excluded from participation

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Franklin Court revisited the preclusion of remedies issue, none of these decisions relied upon the type of thorough analysis of the comprehensiveness of Title IX's remedial scheme required to establish Congressional intent to foreclose a section 1983 remedy. *See, e.g., Bougher*, 713 F.Supp. at 146 (summarily concluding, without analysis, that Title IX is a statute "which contains its own remedies and is implemented through its own procedural scheme"); *Pfeiffer*, 917 F.2d at 789 (accepting, without analysis, district court's refusal to reach plaintiff's § 1983 constitutional claims because such claims were "subsumed" by Title IX and barred by the *Sea Clammers* comprehensiveness doctrine); *Mabry*, 597 F.Supp. at 1239 (summarily stating that trial court was "convinced" that plaintiff's remedies under Title IX would have been comprehensive and adequate had she prevailed on that claim). These cases, therefore, do not provide very persuasive evidence of Congress' intent to preclude a section 1983 remedy, especially in light of *Franklin*.

in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ." 20 U.S.C. § 1681 (emphasis added). The Supreme Court has emphasized that federal courts should accord to Title IX "a sweep as broad as its language." *North Haven Bd. of Educ. v. Bell,* 456 U.S. 512, 521 (1982). However, at least two central questions pertinent to plaintiffs' claim in this case have yet to be directly addressed by the Supreme Court or any circuit court in the section 1983 setting: 1) What is the nature of the right created by Title IX in this context?; and 2) What type of conduct by a defendant amounts to a deprivation of that right?[4] The Court addresses each of these issues in turn below.

i. Nature of the Title IX Right in the Sexual Harassment Context

In the absence of specific Supreme Court or Ninth Circuit precedent directly addressing this question, the Court must look to Title IX itself and to interpretations of the statute by various courts to determine whether the conduct alleged here amounts to a deprivation of a right secured by Title IX.

Federal courts interpreting Title IX have heeded *North Haven*'s direction to read the statute so as to broadly proscribe discrimination on the basis of sex in the educational setting. *See, e.g., Franklin v. Gwinnett County Pub. Sch.,* 112 S.Ct. 1028, 1039 (1992) (explaining that Title IX "unquestionably . . . place[s] on [school districts] the duty not to discriminate on the basis of sex"); *Cohen v. Brown Univ.,* 991 F.2d 888, 894 (1st Cir. 1993) (noting

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[4] This two-part inquiry tracks the standard for evaluating motions to dismiss set out by this Circuit in *Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir. 1990). In other words, the Court must here both determine whether plaintiffs have stated a cognizable legal theory under relevant precedent and, if so, decide whether plaintiffs have alleged facts sufficient to establish their entitlement to recovery under that theory.

that "the statute's heart is a broad prohibition of gender-based discrimination in all programmatic aspects of educatonal institutions"); *Roberts v. Colorado State Bd. of Agric.*, 998 F.2d 824, 833 (10th Cir. 1993), *cert. denied*, 114 S.Ct. 580 (referring to "Title IX's goal of protecting private citizens against discriminatory practices").

These interpretations of Title IX as conferring upon individuals a firm right not to be discriminated against on the basis of gender in all aspects of federally-funded educational programs find strong support in the language of the statute itself. Title IX explicitly provides that no person "shall, on the basis of sex, *be excluded* from participation in, *be denied* the benefits of, or *be subjected to discrimination*" under any educational program or activity receiving federal funding. 20 U.S.C. § 1681(a) (emphasis added). The fact that Title IX focuses on the individual's rights under the statute, rather than simply imposing sanctions on educational institutions which discriminate, strongly indicates that the right created by Title IX to be wholly free from discrimination attributable to that institution and its employees is a *personal* right. *See Cannon*, 441 U.S. at 690-693 (noting that "[t]here would be far less reason to infer a private remedy in favor of individual persons if Congress, instead of drafting Title IX with an unmistakable focus on the benefitted class, had written it simply as a ban on discriminatory conduct by recipients of federal funds or as a prohibition against the disbursement of public funds to be educational institutions engaged in discriminatory practices").[5]

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[5] The *Cannon* Court contrasted the language eventually codified in Title IX with an alternative proposal considered but rejected by Congress before the statute's enactment. Unlike Title IX, the proposed statute was not phrased in terms of an individual plaintiff's rights. Instead, it provided that the Secretary of the Department of Health, Education, and Welfare, at that time the official who would be responsible for the enforcement of the statute, "shall not make any grant . . . [to] any institution of higher edu-

Viewed together, Title IX and those federal decisions which have interpreted it stand for the principle that Title IX confers on plaintiffs an individual right not to be discriminated against or disadvantaged in the administration of educational programs on the basis or gender. Accordingly, the Court holds that where a plaintiff sufficiently alleges that she has been deprived, under color of state law, of her right not to be discriminated against on the basis of sex within the meaning of Title IX, she has stated a claim under section 1983.[6]

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cation . . . unless the application . . . for such grant . . . contains assurances . . . that any such institution . . . will not discriminate on the basis of sex in the admission of individuals." 441 U.S. at 693 n.14. Unlike the language of the current statute, such a construction could not fairly have been read to confer a right not to be discriminated against upon an individual plaintiff under the analysis set out by the Ninth Circuit in *Boatowners*.

[6] Defendants base their argument that plaintiffs' section 1983 claim should be precluded here in large part on their reading of *Doe v. Petaluma City School District*, 830 F. Supp. 1560 (N.D. Cal. 1993). The *Doe* court held that "individuals may not be held personally liable under Title IX." *Id.* at 1577. The individual defendants assert that to allow plaintiffs to bring a section 1983 action against them as individuals when no action would lie under Title IX itself would be somehow improper. Under defendants' reasoning, a plaintiff should be allowed to enforce under section 1983 only those substantive rights which she could enforce directly under the statute creating those rights.

Defendants' position is at odds with controlling precedent in this circuit. In *Boatowners*, 716 F.2d at 674, the Ninth Circuit rejected the argument that "a plaintiff who [is] unable to demonstrate a private right of action under [a federal] statute would necessarily be barred from seeking a section 1983 remedy." The opinion explained that "there are both substantive and evidentiary distinctions between the [statutory and section 1983] causes of action," most notably the presumption that a federal statute creating enforceable rights may be enforced in a section 1983 action. *Id.* The *Boatowners* court concluded that "the plaintiff who establishes the existence of an enforceable right will be free to proceed under section 1983," and noted that "there could well be federal rights

An essential question, however, remains for the Court to resolve in determining the scope of the right not to be discriminated against created by Title IX and enforceable under section 1983 in the instant context: whether intentional discrimination by a state actor is an element of a violation of that right.[7] For the reasons explained below, the Court finds that intentional discrimination is an element of a claim that an individual official has violated a plaintiff student's rights under Title IX by engaging in or allowing sexual harassment of that student.[8]

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enforceable under section 1983 which are not enforceable by means of a private right of action under the statute creating them." *Id.*

The Court has already found that Title IX confers a personal right not to be discriminated against on a group of individuals to which plaintiff belongs. Accordingly, the Court concludes that, under *Boatowners*, plaintiff here may enforce that right against the individual defendants under section 1983, even assuming *arguendo* that she could not do so under Title IX itself.

[7] This question is of central importance in evaluating plaintiffs' section 1983 claim, as it is well settled that such a plaintiff must allege and eventually prove all elements, including culpable state of mind if applicable, necessary to establish a violation of the right upon which the section 1983 claim is based. *See Daniels v. Williams*, 474 U.S. 327, 330 (1986) (explaining that "in any given § 1983 suit, the plaintiff must still prove a violation of the underlying constitutional [or federal statutory] right; and depending on the right, merely negligent conduct may not be enough to state a claim").

[8] The Court is aware of holdings from courts in other circuits stating that a plaintiff may make out a violation of Title IX without proving a defendant's specific intent to discriminate. *See Roberts v. Colorado State Bd. of Agriculture*, 998 F.2d 824, 832 (10th Cir. 1993) (holding that under Tenth Circuit precedent the "district court did not err . . . in failing to require proof of discriminatory intent" in Title IX action); *Cook v. Colgate Univ.*, 802 F.Supp. 737, 741 (N.D.N.Y. 1992), *vacated*, 992 F.2d 17 (2d Cir. 1993) (finding that "Title IX . . . can be violated without showing a specific intent on the part of the educational institution to discriminate against women"). However, those decisions which have addressed the intent issue and found that no showing of intentional discrimination is required have involved suits against educational

In *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1038 (1992), the Supreme Court held that monetary damages were available as a remedy in a Title IX enforcement action brought by a private plaintiff against a school district. The plaintiff in *Franklin* was a high school student who alleged that she had been subjected to continual sexual harassment by one of her male teachers. Plaintiff further charged that teachers and administrators at her school took no action to halt their sub-

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institutions alleging inequitable allocation of resources to athletic programs serving males and females. *See Roberts*, 998 F.2d at 824 (discontinuation of university's women's varsity softball program); *Cook*, 802 F. Supp. at 737 (denial of varsity status to women's ice hockey team); *Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993) (revocation of varsity status of women's volleyball and gymnastics teams).

Because a plaintiff's Title IX claim in an inequitable funding case is fundamentally different from plaintiffs' discriminatory treatment claim here, the Court sees no inconsistency in requiring a plaintiff to prove discriminatory intent in the latter type of case even where she might not be required to do so in the former. Unlike the cases considered by courts in the funding context, suits like the instant action necessarily implicate the mental state of the individual defendants to the extent that plaintiffs directly allege that those officials took particular actions which disadvantaged Oona and other female students *because* those students were female. The primary problem present in an allocation of resources suit against an institution—the difficulty of proving, or even defining, an institution's "discriminatory intent" based on its funding decisions—is not present in a suit in which plaintiffs allege a direct violation of a student's rights under Title IX by individual officials who, because of that student's sex, discriminate against her.

For this reason, the Court's holding requiring a plaintiff student to allege discriminatory intent in order to state a section 1983 claim based on sexual harassment in violation of Title IX is in no way meant to imply that such a standard would necessarily be properly applied in Title IX actions involving disparate impact/inequitable funding claims. Rather, today's ruling is limited to the circumstance in which a plaintiff student claims that her rights under Title IX have been violated by the participation of school officials in sexual harassment or their failure to prevent or remedy such harassment by others (including other students).

ordinate's harassment of the plaintiff even though they were aware of and had investigated the harassment. 112 S.Ct. at 1031. Neither the teacher alleged to have harassed the plaintiff nor the other individual officials were themselves defendants in plaintiff's Title IX action at the time the case was reviewed by the Supreme Court.[9]

In finding that damages remedy was available in plaintiff's Title IX action, the *Franklin* Court explained that the withholding of monetary damages was not justified in cases in which intentional discrimination was alleged, and described the circumstances under which an institutional defendant in a Title IX action will be found to have intentionally discriminated:

> In *Pennhurst State School and Hospital v. Halderman* . . . , the Court observed that remedies were limited under [statutes enacted pursuant to Congress' Spending Clause power] when the alleged violation was *unintentional*. Respondents and the United States maintain that this presumption should apply equally to *intentional* violations. We disagree. The point of not permitting monetary damages for an unintentional violation is that the [institution receiving federal funding] lacks notice that it will be liable for a monetary award. This notice problem does not arise in cases such as this, in which intentional discrimination is alleged. Unquestionably, Title IX placed on the [defendant school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe that the same rule should apply when a teacher sexually harasses and abuses a

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[9] The teacher alleged to have engaged in the sexual harassment was never a defendant in the lawsuit, and the only individual defendant in the case had been dismissed by the district court. *See Franklin v. Gwinnett County Public Schs.*, 911 F.2d 617, 622 (11th Cir. 1990).

> student. Congress surely did not intend for federal monies to be expended to support the intentional actions it sought by statute to proscribe.

112 S.Ct. at 1037 (citatons omitted).[10]

In distinguishing *Pennhurst* and explaining that intentional discrimination creates a *prima facie* entitlement to monetary damages under Title IX in a way that unintentional conduct simply does not, therefore, the *Franklin* decision implicitly holds that intentional discrimination is an element of a claim that a school district has violated a plaintiff's rights under Title IX, at least where that student seeks to obtain damages against the district for harassment engaged in by an employee. Further, in establishing that a school district will be found to have intentionally dis-

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10 The *Franklin* Court refused to address the question of whether Title IX was in fact enacted pursuant to the Spending Clause power. 112 S.Ct. at 1038 n.8 ("Because we conclude that a money damages remedy is available under Title IX for an intentional violation irrespective of the constitutional source of Congress' power to enact the statute, we need not decide which power Congress utilized in enacting Title IX.").

The Supreme Court recognized in *Cannon v. Univ. of Chicago* that "Title IX was patterned after Title VI," and noted that the two statutes were to be interpreted in a similar manner. 441 U.S. at 694-96. Under Title VI, "no person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance." 42 U.S.C. § 2000d.

In *Guardians Association v. Civil Service Commission of New York*, 463 U.S. 582, 610-11 (1983), the Supreme Court held, without a majority opinion, that Title VI plaintiffs must prove discriminatory intent on the part of a defendant in order to obtain damages under that statute. That decision also strongly suggested that Title VI, the statute upon which Title IX is based, was enacted pursuant to the Spending Clause. *See* 463 U.S. at 598 ("I note first that Title VI is spending-power legislation") (White, J., plurality opinion). For this reason, this Court assumes, absent direction to the contrary from the Ninth Circuit or the Supreme Court, that Title IX was likewise enacted pursuant to the Spending Clause. *See Doe*, 830 F. Supp. at 1574 n.9.

criminated when one of its employees sexually harasses and abuses a student, *Franklin* clearly assumes that the conduct of the employee who actually engages in such harassment constitutes a violation of that student's rights under Title IX as well. *See Doe v. Petaluma City School Dist.*, 830 F. Supp. at 1575 ("Although not expressly stated in the opinion, the rule laid down by *Franklin* appears to be that, under Title IX, damages are available only for intentional discrimination but respondeat superior liability exists, so that an institution is deemed to have intentionally discriminated when one of its agents has done so.").

The logical conclusion to be drawn from these two premises is that when a student seeks recovery under section 1983 against an individual school official based on that official's alleged engagement in or failure to prevent sexual harassment in violation of her rights under Title IX, that student must as a preliminary matter establish that one of two prerequisites is satisfied. The plaintiff student must show that each defendant official either intentionally discriminated against her on the basis of sex or is liable under standard section 1983 supervisory liability principles for his own wrongful conduct in supervising a subordinate who intentionally discriminated. Where, as in *Franklin*, the plaintiff student alleges that a teacher or other school official has directly engaged in harassment, such a showing may be made by establishing that each defendant official has either sexually harassed the plaintiff, *Franklin*, 112 S.Ct. at 1037, or is responsible for the harasser's conduct under principles of supervisory liability. Where plaintiff's peers or other non-officials are alleged to have engaged in sexual harassment, a plaintiff must likewise establish either intentional discrimination or direct supervisory responsibility for a subordinate official's discriminatory conduct on the part of such individual defendant named.[11]

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[11] As the *Doe* court has explained, the reasoning of *Franklin* compels the conclusion that a finding that a student's rights under

The Court finds that the reasoning of *Franklin* and *Doe* persuasively establishes that intentional discrimination is an element of a Title IX claim against an institutional defendant in circumstances like those present in the instant action. Accordingly, following the reasoning of those holdings to their logical conclusion in the context of a suit brought under section 1983, the Court holds that a plaintiff must prove that an indivdual defendant either intentionally discriminated against her or had supervisory responsibility for a subordinate's intentional violation of the plaintiff's rights in order for such a claim based on the violation of rights under Title IX to lie against that defendant. The Court is confident that this holding is true to the spirit of the Supreme Court's mandate that rights under Title IX be given a sweep as broad as the language of that statute while remaining consistent with the clear import of the *Franklin* decision.[12]

Title IX have been violated in the peer harassment context requires a determination that at least one defendant official has affirmatively discriminated against that student on the basis of gender:

> [*Franklin*] require[s] that discriminatory intent be shown before damages are recoverable. . . . The court holds that no damages may be obtained under Title IX (merely) for a school district's failure to take appropriate action in response to complaints of student-to-student sexual harassment. Rather, the school district must be found to have intentionally discriminated against the plaintiff student on the basis of sex. The school's failure to take appropriate action, as alleged in plaintiff's complaint, could be circumstantial evidence of intent to discriminate.

830 F. Supp. at 1576; *see also Houston v. Mile High Adventist Academy*, 846 F. Supp. 1449, 1457 (D.Colo. 1994) (citing *Franklin* and holding, in case in which plaintiff student claimed that she had been subjected to sexual harassment at school, that "a plaintiff may recover damages for the violation of Title IX only for intentional violations").

[12] In their complaint, plaintiffs maintain that Title IX imposes on defendant school officials "a legal and equitable duty to provide a discrimination, harassment, and retaliation-free environment." Compl. 18:10-11. The Court finds plaintiffs' reading of Title IX as

ii. Have Plaintiffs Sufficiently Alleged a Deprivation of Oona's Rights Under Title IX?

Having concluded that plaintiffs' claim is legally cognizable, the Court must next determine, under the second prong of the *Balistreri* standard, whether the facts alleged by the plaintiffs are sufficient to state a section 1983 claim against any or all of the defendants. Plaintiffs base their claim that defendants violated Oona's rights under Title IX here on two broad classes of conduct: 1) Ibach's alleged harassment and assault of Oona; and 2) alleged harassment of Oona by other students. In effect, the structure of plaintiff's complaint suggests two independent potential theories of liability with regard to every individual defendant besides Ibach: supervisory liabiilty for Ibach' actions, and liability, either direct or supervisory, based on the student-to-student harassment endured by Oona. The Court must accordingly decide whether either or both of these types of conduct as pleaded constitute a deprivation of rights protected by Title IX sufficient to state a claim under section 1983 against any or all of the named defendants.

a. Ibach's Conduct

The compaint alleges that Ibach on one occasion suddeny approached Oona from behind on the playground,

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requiring schoolteachers and administrators to absolutely guarantee the existence of a "discrimination-free" or "harassment-free" environment troubling in this context and unsupported by the language of the statute.

The language of Title IX clearly reflects Congress' intent to confer on individuals a right not to be discriminated against on the basis of sex by state actors. From this premise, it follows that the ultimate fact which a plaintiff seeking to make out a claim based on an alleged violation of Title IX must prove is that the defendant *in fact* discriminated against her because of her sex, not that the defendant failed to guarantee that the plaintiff would not be exposed to any such discrimination by third parties.

fondled her buttocks and whispered "Hi, Oona Noodles," a nickname which he had given her, in her ear. Compl. 6:5-8. Ibach, and only Ibach, addressed Oona in class and on school grounds on several occasions by this nickname, stopping only when she asked him to. Compl. 4:20-5:5. The complaint further alleges that on a different occasion Ibach sat down close behind Oona with his legs straddling her body and leaned over her, and resumed this position even after she attempted to move away from him. Compl. 5:6-13. Plaintiffs allege that Ibach singled Oona out for his unwelcome attention on the basis of her sex.

The Court finds that plaintiffs have stated a claim under section 1983 against Ibach based on his alleged deprivation of Oona's rights secured by Title IX. The Supreme Court and lower federal courts have indicated that actions like those allegedy taken by Ibach can constitute gender discrimination within the meaning of Title IX. As the Court explained in *Franklin*:

> Unquestionably, Title IX placed on [school district] the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." . . . *We believe the same rule should apply when a teacher sexually harasses and abuses a student.*

112 S. Ct. at 1037 (citation omitted) (emphasis added).[13]

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[13] The Supreme Court has defined actionable "hostile environment" sexual harassment as that which is "sufficiently severe or pervasive 'to alter the conditions of the victim's employment and create an abusive working environment.'" *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986). One commentator notes that "[s]exual harassment can [take] many forms: verbal harassment such as sexual comments or name calling; leering or ogling; jokes or pictures; unnecessary touching; sexist remarks about a person's clothing, body, or sexual activities; constant brushing up against a person's body; subtle or overt pressure for sexual favors; physical assault; and rape." Monica L. Scherer, Comment, *No Longer Just*

In *Patricia H. v. Berkeley Unified School District*, 830 F. Supp. 1288, 1293 (N.D. Cal. 1993), the court held that a plaintiff student could state a claim for hostile environment sexual harassment under Title IX based on the alleged conduct of a teacher. Taking note of the legislative history of Title IX and a number of other factors, including the criteria applied by the Office of Civil Rights of the Department of Education, the *Patricia H.* court explained that a plaintiff's rights under Title IX are infringed where a teacher sexually harasses a student because "[a] sexually abusive environment inhibits, if not prevents, the harassed student from developing her full intellectual potential and receiving the most from the academic program." 830 F. Supp. at 1293 (*quoting* Ronna Greff Schneider, *Sexual Harassment and Higher Education*, 65 Tex. L.Rev. 525, 551 (1987)).

Taking plaintiffs' allegations as true, as it must on this motion to dismiss, therefore, the Court concludes that plaintiffs have stated a section 1983 claim against Ibach based on his alleged discrimination against Oona in contravention of Title IX.[14] Accordingly, Ibach's motion to

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Child's Play: School Liability Under Title IX for Peer Sexual Harassment, 141 U.Pa. L.Rev. 2119, 2127 (1993).

Taking the facts in the complaint as true, as it must on a motion to dismiss, the Court finds that plaintiffs have sufficiently established that Ibach's behavior toward Oona and her female classmates constituted sexual harassment.

[14] Under Ninth Circuit precedent, where subjective intent is an element of the violation alleged under section 1983, plaintiffs must "state in their complaint nonconclusory allegations setting forth evidence of unlawful intent" on the part of defendant officials. *Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991), *cert. denied*, 114 S.Ct. 2704 (1994). Such evidence may be either direct or circumstantial. *Id.* at 1387. If a plaintiff fails to set forth such evidence of intent on the part of named defendant officials in her complaint, the district court may dismiss plaintiff's claim against those officials. *See id.* at 1388 (reversing district court's denial of

dismiss plaintiff's section 1983 claim against him is DENIED.[15]

The more difficult question is whether plaintiffs have stated a viable section 1983 claim against the other individual named defendants predicated on a theory of su-

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defendant's motion to dismiss and remanding for reconsideration in light of newly-stated heightened pleading standard).

The Court first concludes that subjective intent is an element of plaintiffs' § 1983 claim in this case. Plaintiffs base their claim on alleged violations of Title IX and the Equal Protection and Due Process clauses of the Constitution. Discriminatory intent is an essential element of plaintiffs' claim based on Title IX for the reasons explained above. Discriminatory intent is similarly an element of a section 1983 claim based on the Equal Protection clause. *See Bator v. Hawaii*, 39 F.3d 1021, 1028 n.7 (9th Cir. 1994) (explaining that "a plaintiff must show intentional discrimination . . . for equal protection claims"). While at present it is not clear whether an allegation of reckless, as opposed to intentional, conduct is sufficient to state a claim under the Due Process clause, *see Daniels v. Williams*, 474 U.S. 327, 328 (1986), plaintiffs have based their § 1983 claim on some combination of these statutory and constitutional sources rather than bringing three discrete claims. Considering plaintiffs' § 1983 claim as a whole, therefore, the Court finds it apropriate to apply the *Branch* heightened pleading standard in ruling on defendants' motion to dismiss.

The Court finds that plaintiffs have met the *Branch* standard with respect to Ibach here. The allegations in the complaint regarding Ibach's behavior, taken as true, are nonconclusory and sufficient to support an inference that Ibach intentionally discriminated against Oona on the basis of her sex. Accordingly, dismissal of plaintiffs' claim under *Branch* at this time would be inappropriate.

[15] In light of its ruling that plaintiffs have stated a section 1983 claim against Ibach based on his alleged deprivation of rights conferred on Oona under Title IX, the Court need not address the contention raised by Ibach on his motion to dismiss that "the factual conduct complained of could not, as a matter of law, implicate any constitutional right" under the Fourteenth Amendment. Ibach's Mem. P & A Support Mot. Dismiss at 6. As explained above, section 1983 also provides a remedy for the deprivation of federal *statutory* rights under color of state law, and plaintiffs have sufficiently alleged such a deprivation here.

pervisorial responsibility for Ibach's conduct. As explained above, no section 1983 liability may attach under a theory of *respondeat superior*. *Monell v. Department of Social Servs.*, 436 U.S. 658, 663-64 n.7 (1978); *Ybarra v. Reno Thunderbird Mobile Home Village*, 723 F.2d 675, 680 (9th Cir. 1984). Instead, as a general rule, "[a] supervisor cannot be held liable under § 1983 for the constitutional deprivations caused by his subordinate, absent his participation or direction in the deprivation." *Ybarra*, 723 F.2d at 680. The Ninth Circuit has held that "[s]upervisory liability is imposed against a supervisory official in his individual capacity for his 'own culpable action or inaction in the training, supervision, or control of his subordinates,' . . . for his 'acquiescence in the constitutional deprivations of which the complaint is made,' . . . or for conduct that showed a 'reckless or callous indifference to the rights of others.'" *Larez v. Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citations omitted).

The Court finds that plaintiffs have alleged facts sufficient to state a section 1983 claim based on supervisorial liability against defendants McCaffrey, Hill, and Lundy.[16] Plantiffs allege that Ibach committed acts of harassment against female students in clear view of McCaffrey and Hill. Complaint 5:18-20. Further, the complaint alleges that McCaffrey and Hill failed to respond appropriately to Ibach's conduct. Complaint 6:13-28; 7:1-20; 8:4-16. Finally, the complaint alleges that Lundy failed to respond to Ken R.'s request for information regarding the appropriate person to contact with any further concerns or complaints about Ibach's conduct. Complaint 9:6-8. Construing these allegations liberally, as it must on this motion to dismiss, plaintiffs' allegations state a claim under section 1983 against these three defendants based on culp-

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[16] The viability of plaintiffs' claim against Lundy depends in part on whether he is being sued in his official or individual capacity, a question which plaintiffs must resolve in an amended complaint. *See* note 22, *infra*.

able action or inaction in the training, supervision, or control of their subordinate Ibach and/or acquiescence in his conduct which deprived Oona of her rights under Title IX.

The Court finds, however, that plaintiffs have failed to allege facts sufficient to establish the supervisory liability under section 1983 of defendants Solie, White, and Alsobrook. The complaint contains no factual allegations of any kind pertaining to these defendants, meaning that their inclusion in this action as presently pled can only be based on a *respondeat superior* theory. Because no *respondeat superior* liability exists under section 1983, however, plaintiffs' claims against these defendants must be DISMISSED WITH LEAVE TO AMEND to the extent that these defendants' alleged liability is predicated on supervisory responsibility for Ibach's conduct. Plaintiffs may amend their claims against these officials within 30 days of the date of this Order to allege facts sufficient to establish these defendants' supervisory liability for Ibach's alleged conduct under the test set out in *Larez*.

b. Student-to-student harassment

Drawing in large part on legal theory developed by the Supreme Court in cases brought under Title VI, the civil rights statute upon which Title IX is based, a court in this district held in 1993 that a school district violates Title IX when it discriminates against students on the basis of sex, and that district officials' failure to take appropriate action to remedy peer sexual harassment can constitute evidence of such discriminatory intent. *See Doe*, 830 F. Supp. at 1575 (explaining in case involving alleged peer harassment that "[s]urely [a student] is 'denied the benefits of, or subjected to discrimination under' an education program on the basis of sex when, as alleged here, she is driven to quit an education program because of the severity of the sexual harassment she is forced to endure in the program"). Recently, the Ninth Circuit strongly

implied, in dicta, that school teachers and administrators have a duty under Title IX to take steps to curb peer sexual harassment. *Clyde K. v. Puyallup Sch. Dist. No. 3*, 35 F.3d 1396, 1401 (9th Cir. 1994) (explaining that "[g]iven the extremely harmful effects [peer] sexual harassment can have on young female students, public officials have an especially compelling duty not to tolerate it in the classrooms and hallways of our schools") (citing Monica L. Scherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U.Pa. L.Rev. 2119, 2133-35 (1993)).[17]

The Court believes that *Doe*, especially read in light of the Ninth Circuit's recent statement in *Clyde K.*, stands for the proposition that the right created by Title IX may be violated when female students are subjected to sexual harassment by their male peers at school and school officials discriminate against the female students on the basis of sex in encouraging or failing to appropriately respond to such harassment. Such discrimination may manifest itself in the active encouragement of peer harassment, the toleration of the harassing behavior of male students, or the failure to take adequate steps to deter or punish peer harassment. *Cf. Doe*, 830 F. Supp. at 1575-76.

Under this standard, the Court finds that plaintiffs have alleged facts which, construed liberally, state a section 1983 claim against defendants McCaffrey, Hill and Lundy[18] predicated on the peer sexual harassment endured by Oona.[19] Plaintiffs allege that McCaffrey intentionally

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[17] The Court believes that the facts alleged in the complaint, taken as true, sufficiently establish that Oona's male classmates subjected her to sexual harassment. *See* note 13, *supra*.

[18] Again, the sufficiency of plaintiffs' claim against defendant Lundy will depend on whether he is being sued in his official or his individual capacity. *See* note 22, *infra*.

[19] Because, as previously explained, intentional discrimination is an element of plaintiffs' section 1983 claim based on defendants' alleged encouragement or tolerance of peer sexual harassment in

discriminated against Oona on the basis of her sex by refusing to take sufficient action to counter persistent harassment by Oona's peers and by retaliating against Oona on more than one occasion for objecting to that harassment. Complaint 9:9-13:24. Similarly, plaintiffs allege that Hill and Lundy failed to adequately investigate or take steps to punish those responsible for repeated instances of peer harassment reported to them by Oona and her parents. Complaint 10:10-11:24. Under the liberal test applied in ruling on a motion to dismiss, therefore, the Court is convinced that dismissal of plaintiff's claims against McCaffrey, Hill, and Lundy would be inappropriate at this stage.[20]

However, as noted above, plaintiffs have failed to include in their complaint any factual allegations whatsoever with regard to defendants White, Solie, and Alsobrook. Thus, whether plaintiffs' claim against these three defendants is based upon their alleged personal discrimination against Oona or upon their alleged failure to adequately supervise and control McCaffrey and their other subordinates, the complaint as currently configured does not provide the factual support necessary to state a claim against any of these three officials.[21] Apart from

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violation of Title IX, the Court must apply the heightened pleading standard set out in *Branch*. Applying that standard, the Court finds plaintiffs' allegations nonconclusory and sufficient to support an inference that McCaffrey, Hill and Lundy intentionally discriminated against Oona on the basis of her sex. For this reason, these claims are sufficiently pled under the *Branch* standard and should not be dismissed at this stage.

20 The Court stresses that if discovery does not reveal facts sufficient to support plaintiffs' assertion that defendants intentionally discriminated against Oona on the basis of her sex, plaintiffs' claim would be unable to survive a motion for summary judgment.

21 Plaintiffs' papers suggest that their claim against the District administrators is premised primarily on the theory that the personal actions of those officials directly contributed to the creation

plaintiffs' bald assertion that it is "absolutely inconceivable" that these defendants did not know of their obligations to remedy discrimination within the meaning of Title IX, no basis other than a pure *respondeat superior* theory could possibly underlie plaintiff' claim against these officials in the absence of at least some factual allegations of wrongful conduct. Because this theory clearly does not support imposition of liability under section 1983, plaintiffs' claims against White, Solie, and Alsobrook are DISMISSED WITH LEAVE TO AMEND. Plaintiffs may amend their claims against these officials within 30 days of the date of this Order to allege facts sufficient to establish a basis for section 1983 liability. To the extent that plaintiffs' claim is based on alleged discrimination against Oona by each individual District official personally, plaintiffs must plead facts sufficient to support an inference that each defendant intentionally deprived Oona of her right under Title IX not to be discriminated against on the basis of sex. To the extent that plaintiffs' claim is based on the District officials' supervisory liability for the actions of McCaffrey and other District employees, plaintiffs must plead facts sufficient to state a claim against each defendant under the test set out in *Larez v. Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991), as explained above.[22]

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of a hostile atmosphere for Oona and other female students. *See* Mem. P & A Opp'n Defs.' Mot. Dismiss at 10 ("[D]efendants' wrongful conduct also consisted of actively creating, developing, and maintaining a climate of blatant sexual favoritism . . . . *Th*[*e*] *harassment was then exacerbated by the school district officials' own failure to investigate and/or punish the boys who were verbally and physically harassing Oona*, or punish defendants McCaffrey and Hill for allowing the harassment to continue . . . .") (emphasis in original). As noted above, however, plaintiffs provide absolutely no factual examples of ostensibly discriminatory conduct on the part of White, Solie and Alsobrook.

[22] The Court trusts that plaintiffs' complaint will not be amended to include new factual allegations against defendants White, Solie, and Alsobrook unless plaintiffs' counsel first satisfy their obliga-

B. *Qualified Immunity Defense*

Defendants next argue that, even if plaintiffs have sucessfully stated a claim under section 1983, they are entitled to qualified immunity from liability on that claim [23]. They argue that it was not clearly established in late 1992 and early 1993 that the conduct alleged by plaintiffs constituted a violation of plaintiff Oona's constitutional or statutory rights. Further, defendants argue that plaintiffs' own allegations in the complaint establish that the defendants acted reasonably under the circumstances of this case and ought not be held liable for

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tion under Rule 11 of the Federal Rules of Civil Procedure to verify that any new allegations are well grounded in fact.

The Court also notes that at oral argument, plaintiffs' counsel stated that only three individual defendants—McCaffrey, Ibach, and Hill—were being sued in their individual capacities. This response appears to contradict plaintiffs' complaint, which names as defendants in the section 1983 claim "McCaffrey, Ibach, Hill, Lundy, Solie, White, and Alsobrook, *Individually*." Complaint 18:2-4 (emphasis added).

The Court directs plaintiffs to file an amended complaint within 30 days of the date of this order unambiguously specifying the capacity, official or individual, in which each defendant is being sued. That distinction is of central importance in determining the scope of immunity, if any, to which the defendants are entitled. Supreme Court precedent clearly establishes that a suit against a state official in her official capacity is treated as a suit against the state, and Eleventh Amendment immunity applies in such suits. *Hafer v. Melo*, 502 U.S. 21, 112 S.Ct. 358, 361-62 (1991) (explaining that "neither a State nor its officials acting in their official capacities are 'persons' under § 1983"). However, a suit against a state official in her individual capacity is not so barred. 112 S.Ct. at 365 (holding that "state officials, sued in their individual capacities, are 'persons' within the meaning of § 1983" and noting that "the Eleventh Amendment does not bar such suits").

[23] As school and district administrators and teachers, the individual defendants are clearly entitled to assert the defense of qualified immunity. *See Wood v. Strickland*, 420 U.S. 308, 318 (1975) (school board members entitled to assert qualified immunity defense to suit brought under § 1983); *Bilbrey v. Brown*, 738 F.2d 1462, 1467 (9th Cir. 1984) (teacher and vice-principal entitled to qualified immunity under certain circumstances).

damages. Not surprisingly, plaintiffs dispute both of these claims.

Preliminarily, the Court notes that the proper framing of the qualified immunity analysis to be applied by the Court in this case is not entirely clear under Ninth Circuit precedent. As a general rule, government officials performing discretionary functions are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982). However, in a 1988 decision which was subsequently vacated by the Supreme Court on mootness grounds, the Ninth Circuit held that "qualified immunity is not a defense in cases involving intentional racial or other similar discrimination." *Gutierrez v. Municipal Court,* 838 F.2d 1031, 1051 (9th Cir. 1988), *vacated as moot,* 490 U.S. 1016 (1989). As plaintiffs here allege that defendants intentionally discriminated against Oona on the basis of her sex, therefore, defendants' qualified immunity claim must necessarily fail at the present stage under *Gutierrez* if that decision retains precedential force on this point.[24]

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[24] As the Ninth Circuit persuasively explained in *Gutierrez*:

> If the plaintiff fails to establish that the discrimination was intentional, the claim fails. If the plaintiff does establish such intent, there can be no qualified immunity. Thus, it seems simpler to say that qualified immunity is not a defense in such cases, rather than that the defense prevails where proof of intentional discrimination is not established.

838 F.2d at 1051 n.29. *See also Sanchez v. Santa Ana,* 936 F.2d 1027, 1040 (9th Cir. 1990), *cert. denied,* 112 S.Ct. 417 (apparently citing *Gutierrez,* after that case had been vacated, for the proposition that governmental officials are not entitled to qualified immunity from a section 1983 action based on intentional discrimination). *But see Garcia v. Spun Steak Co.,* 998 F.2d 1480, 1487 n.1 (9th Cir. 1993) (stating that *Gutierrez* "has no precedential authority . . . because it was vacated as moot by the Supreme Court," and concluding that the *Garcia* court was "in no way bound by [*Gutierrez*'s] reasoning").

Further, even if *Gutierrez* does not provide the controlling standard here, the Court finds that it would be inappropriate to grant qualified immunity to the defendants on the instant motion to dismiss. Since *Harlow*, the Supreme Court has not to this Court's knowledge considered a qualified immunity case in which intent or motive was an element of the constitutional offense at issue. The Ninth Circuit, however, has recently noted that the *Harlow* analysis, which focuses on the "objective reasonableness" of a defendant official's conduct, can produce outcomes which are "nonsensical in relation to a constitutional tort that depends on a subjective element, an invidiously discriminatory intent, for its very viability." *Lindsey v. Shalmy*, 29 F.3d 1382, 1384 (9th Cir. 1994). Application of a purely objective test in such instances, as explained by the *Lindsey* court, would lead to an unacceptable result: defendant officials alleged to have invidiously discriminated against plaintiffs would invariably be found immune from liability for their actions.[25] *Id.*

Faced with the conundrum of remaining faithful to the objective rationale of *Harlow* without effectively eliminating plaintiffs' right to recover damages in an entire class of cases, the Ninth Circuit in *Lindsey* fashioned a test which allows courts to take subjective intent into account under some circumstances in determining whether a defendant is entitled to qualified immunity. Where the violation alleged depends upon a subjective element, the proper threshold question is whether a reasonable official in defendant's position at the relevant time would know that subjecting plaintiff to the treatment alleged *because of* her membership in a protected class would violate the plaintiff's clearly established federal statutory or constitutional rights. *Lindsey*, 29 F.3d at 1384 (emphasis

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[25] *Lindsey* makes no mention of the apparent resolution of this dilemma by *Gutierrez*, and does not indicate whether that decision retains any precedential value on the qualified immunity issue.

added).[26] Where a plaintiff presents nonconclusory allegations of subjective motivation and supports those allegations by sufficient direct or circumstantial evidence, as required under *Branch*, therefore, a qualified immunity claim will be denied on a motion to dismiss. *See id.* at 1384-85 (discussing *Branch* and applying the holding of that case in the summary judgment context).

Applying the standards set out in *Lindsey*, the Court finds that plaintiffs have stated a claim sufficient to make dismissal of defendants McCaffrey, Hill, and Lundy on qualified immunity grounds inappropriate at this time. As noted above, plaintiffs have sufficiently alleged that defendants McCaffrey, Hill, and Lundy discriminated against Oona both by failing to adequately supervise and control Ibach and by tolerating or condoning peer sexual harassment directed at Oona. As discussed below, the Court is confident that a reasonable school official would have known in 1992 and 1993 that the actions alleged by plaintiffs here in each of these regards would unquestionably violate Oona's federal statutory and constitutional rights.

1. Supervisory Liability

The Supreme Court held in *Franklin v. Gwinnett County Public Schools*, 112 S.Ct. 1028, 1037 (February 26, 1992), that when a teacher sexually harasses and abuses a student, that teacher discriminates on the basis

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[26] A court in this district illuminatingly described, six years before *Lindsey*, a situation of the type which the *Lindsey* court presumably had in mind in detailing the qualified immunity standard to be applied in these cases:

> [I]t is not a violation of the constitution for a government official to fire a black employee, but it most assuredly is a violation of clearly established federal rights to fire an employee *because* he is black. "The act itself—the act of discharge—is neutral; it is the motive or the intent that makes the act both actionable and violative of clearly established law."

Willson v. Cagle, 711 F. Supp. 1521, 1530 (N.D. Cal. 1988) (citation omitted).

of sex within the meaning of Title IX. Controlling precedent at that time also held that "[s]upervisory liability is imposed against a supervisory official in his individual capacity for his 'own culpable action or inaction in the training, supervision, or control of his subordinates,' . . . for his 'acquiescence in the constitutional deprivations of which the complaint is made,' . . . or for conduct that showed a 'reckless or callous indifference to the rights of others.'" *Larez v. Los Angeles*, 946 F.2d 630, 646 (9th Cir. 1991) (citations omitted).

A reasonable school official during the 1992-1993 school year, therefore, would have known that her failure to properly train, supervise, or control a student teacher engaged in intentional discrimination against female students on the basis of their sex would violate the statutory and constitutional rights of those students. Plaintiffs have sufficiently alleged intentional discrimination on Ibach's part. Accordingly, plaintiffs have pleaded sufficient allegations to overcome defendants' qualified immunity defense to the supervisory liability claim on a motion to dismiss.

2. Student-to-student harassment

As to the peer harassment claim, the Court finds that well-established precedent which should have been known to defendants in 1992-1993 made clear that disparate treatment of male and female students on the basis of sex with the intent to discriminate against the female students would violate those students' statutory and constitutional rights. *See Goodwin v. Circuit Court*, 729 F.2d 541, 546 (8th Cir. 1984), *cert. denied*, 469 U.S. 1216 (explaining that "[t]he right to be free of invidious discrimination on the basis of sex certainly is clearly established, and no one who does not know about it can be called 'reasonable' in contemplation of law" (*citing with approval Flores v. Pierce*, 617 F.2d 1386, 1391-92 (9th Cir. 1980), *cert. denied*, 449 U.S. 875); *Bator v. Hawaii*, 39

F.3d 1021, 1027-1029 (9th Cir. 1994) (noting that the Ninth Circuit held in 1980 that "the constitutional right to be free from . . . invidious discrimination is so well-established and so essential to the preservation of our constitutional order that all public officials must be charged with knowledge of it"); *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994) (noting that female plaintiff "had a clearly established federal constitutional right to be free of gender discrimination at the hands of a state actor in 1988").[27] Therefore, where a plaintiff has alleged facts sufficient to support an inference that the defendant acted with the intent to discriminate against plaintiff on the basis of her sex, qualified immunity should be denied at this stage.

As explained above, the Court finds that plaintiffs here have alleged facts sufficient to support a finding of intent

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[27] The Court feels compelled to note that the great majority of authorities cited by plaintiffs in support of their argument on the qualified immunity issue—state statutes and school district policies—are *irrelevant* to the question of whether plaintiffs' claims are sufficient to withstand the defendants' qualified immunity challenge. In order to defeat a qualified immunity claim at this stage in a section 1983 action, a plaintiff must sufficiently allege the deprivation of a clearly established right secured by *federal* statutory or constitutional law. While the District's adoption of sexual harassment guidelines might indicate that the defendants *believed* the school could be held liable for peer sexual harassment, that belief in no way establishes that such a legal duty based on federal law *did* in fact exist at that time. *See Ward v. County of San Diego*, 791 F.2d 1329 (9th Cir. 1986), *cert. denied*, 483 U.S. 1020 (1987) (explaining that, in the absence of binding precedent, a court must look to "all available *decisional* law including decisions of state courts, other circuits and district courts" to determine whether a right was clearly established at the time of the alleged violation) (emphasis added) (citation omitted). Plaintiffs' claim that "it is absolutely inconceivable that a school district would go to the time, effort, and expense of creating . . . policies . . . specifically prohibiting student-to-student harassment if it did not fully recognize and understand its potential liability for its failure to prevent and stop it" thus provides the Court little or no useful guidance in resolving this complex question.

against defendants McCaffrey, Hill, and Lundy, necessitating the denial of these defendants' qualified immunity claim. Accordingly, as prescribed in *Branch,* plaintiffs will be allowed to engage in narrowly tailored discovery limited to the issue of whether these three defendants acted with the intent to discriminate against Oona on the basis of her sex.[28] If such discovery does not reveal sufficient factual support for plaintiffs' claim that each of these defendants either intentionally discriminated against Oona on the basis of her sex or is liable in a supervisory capacity for an official who so discriminated, any or all of the defendants may argue in a subsequent motion that they are entitled to summary judgment on qualified immunity grounds on the claim based on peer harassment.

IV. CONCLUSION

For the reasons explained above:

1) Defendants' motion to dismiss is DENIED as to defendants McCaffrey, Hill, and Lundy (if Lundy is sued in his individual capacity). The motion to dismiss is GRANTED as to defendants White, Solie, and Alsobrook, and the plaintiffs' claims against these defendants are DISMISSED WITH LEAVE TO AMEND as specified above.

2) Defendant Ibach's motion to dismiss is DENIED.

IT IS SO ORDERED.

Dated 5/2/95

/s/ Thelton E. Henderson
THELTON E. HENDERSON
Chief Judge
United States District Court

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[28] If plaintiffs amend their complaint to add sufficient allegations of intent on the part of defendants White, Solie, and Alsobrook with regard to the peer harassment claim, the Court may at that time allow limited discovery regarding the intent of these officials as well.

FILED
AUG 19 1998
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 98-101

In The

Supreme Court of the United States

October Term, 1997

PATRICIA McCAFFREY, GERALD HILL, RON LUNDY,

Petitioners,

vs.

OONA R.-S.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Was the law clearly established in 1992-93 that pervasive sexual harassment of a 6th grade female student by her male student-teacher and peers would violate her federal civil rights?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Cited Authorities iii

Misstatements of Fact and Law in Petitioners' Statement of the Case 1

Reasons for Denying the Writ 2

I. There Is No Compelling Reason To Grant. ... 2

A. The Ninth Circuit Limited Its Decision To The Only Issue Appropriate In This Interlocutory Appeal. 2

B. Petitioners Cannot Use The "Qualified Immunity" Doctrine To Justify This Court's Consideration Of Whether They Can Be Sued Under 42 U.S.C. § 1983. 5

1. No Comprehensive Enforcement Scheme 4

2. Correct Assumption 5

3. Correct Application of Standard 6

Table of Cited Authorities

	Page
C. The Circuit Court Correctly Determined That In 1992-93 A Reasonable School Official Would Have Known That Pervasive Sexual Harassment Of Respondent By Her Male Student Teacher And Peers Would Violate Her Federal Civil Rights.	7
D. The Questions Whether Petitioners Can Be Sued Under 42 U.S.C. § 1983 and Whether Title VII Standards Are An Appropriate Analogue For Title IX Liability Should Not Be Considered By This Court.	11
Conclusion	15

TABLE OF CITED AUTHORITIES

Cases Cited:

Anderson v. Creighton, 483 U.S. 635 (1987)	8, 10
Anderson v. Green, 115 S. Ct. 1909 (1995)	13
Bator v. Hawaii, 39 F.3d 1021 (9th Cir. 1994)	2
Cannon v. University of Chicago, 441 U.S. 677 (1978)	5
Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949)	3

Table of Cited Authorities

	Page
Crawford-El v. Britton, 118 S. Ct. 1584 (1998)	5, 6, 7
Davis v. Passman, 442 U.S. 228 (1979)	5
Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc) (petition for cert. filed, November 19, 1997)	12
Digital Equipment Corp. v. Desktop Direct, Inc., 128 L. Ed. 842 (1994)	4
Doe v. Petaluma Sch. Dist., 54 F.3d 1447 (9th Cir. 1995)	2
Elder v. Holloway, 510 U.S. 510 (1994)	8
Ellison v. Brady, 924 F.2d 872 (9th Cir. 1991)	2, 8
Franklin v. Gwinnett County Pub. Schools, 503 U.S. 60 (1992)	2, 4, 5, 7
Gebser v. Lago Vista Independent School District, 118 S. Ct. 1989 (1998)	10, 11, 13, 15
Harlow v. Fitzgerald, 457 U.S. 800 (1982)	5
Kerr v. United States District Court, 526 U.S. 394 (1976)	12
Ketchum v. Alameda County, 811 F.2d 1243 (9th Cir. 1987)	2

Table of Cited Authorities

	Page
Lindsey v. Shalmy, 29 F.3d 1382 (9th Cir. 1994)	2
Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1996)	7
Mitchell v. Forsyth, 472 U.S. 511 (1984)	3, 8
Oona R.-S. v. Santa Rosa City Schools, No. CV-94-0623-TEH, reported at 890 F. Supp. 1452 (N.D. Cal. 1995)	1
Pfeiffer v. Marion Center Area School Dist., 917 F.2d 779 (3rd Cir. 1990)	6, 12
Rowinski v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 165 (1996) ...	12
Siegert v. Gilley, 500 U.S. 226 (1991)	6, 7
Swint v. Chambers County Commission, 131 L. Ed. 2d 60 (1995)	3, 4
United States v. Lanier, 137 L. Ed. 2d 432 (1997) ...	8, 9, 10
Urie v. Thompson, 337 U.S. 163 (1949)	14
Virginia Military Institute v. United States, 508 U.S. 946 (1993)	13
Waid v. Merrill Area Pub. Schools, 91 F.3d 857 (7th Cir. 1996)	6, 13

Table of Cited Authorities

	Page
Washington v. Davis, 426 U.S. 229 (1976)	2
Will v. Calvert Fire Insurance Co., 437 U.S. 655 (1978)	12
Williams v. School Dist. Of Bethlehem, PA, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994)	6
Statutes Cited:	
18 U.S.C. § 242	9
42 U.S.C. § 1983	*passim*
United States Constitution Cited:	
Fourteenth Amendment	2, 9
Rules Cited:	
United States Supreme Court Rule 10	11
United States Supreme Court Rule 11	11
Other Authorities Cited:	
Justice Brennan, *Some Thoughts On The Supreme Court's Workload*, 65 JUDICATURE 230 (1983)	13
Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n. 541 (1958)	14

Table of Cited Authorities

	Page
Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 U. Va. L Rev. 197 (1975)	14
6 Moore's Federal Practice § 511.02 [2] (Matthew Bender 3d ed.)	11
Stern, et al., *Supreme Court Practice*, 7 ed. § 2.11 ...	13
Justice Stevens, *Some Thoughts On Judicial Restraint* 66 JUDICATURE 177 (1982)	14

Respondent Oona R.-S. respectfully requests that this Court deny the petition for writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 143 F.3d 473 (9th Cir. 1998) and replicated in petitioner's Appendix ("Pts' App") A beginning at page 1a. The Court should deny the petition because there is no compelling reason to grant it. A close analysis of the petition reveals that petitioners misrepresent the nature and breath of the opinion below and attempt to "bootstrap" issues appropriately left for final judgment onto the qualified immunity issue correctly decided by the Court of Appeal. This Court should refuse to entertain the remainder of petitioners' specious legal arguments, which have already been rejected by the District and Circuit Courts below, and allow respondent to proceed forward to her rightful day in court.

MISSTATEMENTS OF FACT AND LAW IN PETITIONERS' STATEMENT OF THE CASE

The petition contains a number of misstatements of fact and law which must be brought to the attention of this Court. First, petitioners have not been sued under 42 U.S.C. § 1983 for hostile environment sexual harassment "by third parties" but for their own "deprivation of rights conferred on [respondent] by Title IX and the Fourteenth Amendment [Equal Protection Clause]." *See Oona R.-S. v. Santa Rosa City Schools*, No. CV-94-0623-TEH, reported at 890 F. Supp. 1452 (N.D. Cal. 1995) and replicated in Pts' App C at 24a. Second, respondent Oona R.-S. does allege that her sixth grade teacher, Patricia McCaffrey, "personally participated" in sexually harassing conduct against her by: (1) creating and maintaining a "class log" procedure wherein McCaffrey's class, as opposed to McCaffrey, responded to sexual harassment complaints; (2) not disciplining the boys Oona complained about, in McCaffrey's presence, in that class log procedure and; (3) engaging in multiple acts of retaliation against Oona after she

and her mother complained about the openly hostile environment in McCaffrey's sixth grade class. Pts' App C at 17a-23a. Third, the opinion below was not predicated "solely" on this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), but also on the texts of the Equal Protection Clause of the Fourteenth Amendment and Title IX, and the following judicial opinions: *Lindsey v. Shalmy*, 29 F.3d 1382, 1386 (9th Cir. 1994) (citing *Washington v. Davis*, 426 U.S. 229, 239 (1976); *Doe v. Petaluma Sch. Dist.*, 54 F.3d 1447 (9th Cir. 1995); *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991); *Ketchum v. Alameda County*, 811 F.2d 1243, 1247 (9th Cir. 1987); and *Bator v. Hawaii*, 39 F.3d 1021, 1029 (9th Cir. 1994). Pts' App A at 6a-10a.

REASONS FOR DENYING THE WRIT

I.

THERE IS NO COMPELLING REASON TO GRANT.

A. The Ninth Circuit Limited Its Decision To The Only Issue Appropriate In This Interlocutory Appeal.

The *only* issue before the Court of Appeal in this case was

> whether [the District Court] correctly determined that the individual defendants were not entitled to immunity, because in 1992-93 reasonable school officials would have known that the [sexually harassing] conduct alleged by plaintiff would violate [her] federal [civil] rights.

Pts' App A at 5a. The Court of Appeal correctly held that petitioners were not entitled to qualified immunity, based upon

the constitutional provision, statute, and cases set out above. The Court stressed that the issue before it was very "narrow" and that it held *only* that "in this district the [duties of school officials] to take reasonable steps to remedy a known hostile environment created by a [student's peers]" and to "respond to complaints of harassment and discrimination" by a student against a student-teacher were "clearly established" during the relevant time period. Pts' App A at 10a-11a. The remainder of the decision is, therefore, dicta.

An official defendant claiming qualified immunity is entitled to immediate appeal of *only* the narrow and purely legal question of "whether the facts alleged . . . support a claim of violation of clearly established law." *Mitchell v. Forsyth*, 472 U.S. 511, 528 n.9 (1984). All other appeals must await a "final decision" of the district court, unless review may be had directly to this Court. 28 U.S.C. § 1291; *Swint v. Chambers County Commission*, 131 L. Ed. 2d 60, 69 (1995). This "final decision" rule has been interpreted to include *only* those decisions that are

> conclusive, that resolve important questions separate from the merits, and that are effectively unreviewable on appeal from the final judgment in the underlying action.

Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541, 546 (1949). None of these criteria are met in this case.

Claims of a "right not to be tried" under any of the above-stated criteria must be viewed with "skepticism, if not a jaundiced eye," because "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.' " *Swint v. Chambers County Commission, supra*, 131 L. Ed. 2d at 70,

citing *Digital Equipment Corp. v. Desktop Direct, Inc.*, 128 L. Ed. 842 (1994). For example, a "mere defense to liability" is not immediately appealable because an erroneous ruling on liability "may be reviewed effectively on appeal from final judgment." *Swint v. Chambers County Commission, supra*, 131 L. Ed. 2d at 70.

B. Petitioners Cannot Use The "Qualified Immunity" Doctrine To Justify This Court's Consideration Of Whether They Can Be Sued Under 42 U.S.C. § 1983.

In a series of rather convoluted arguments, petitioners inappropriately attempt to use the "Qualified Immunity" doctrine to convince this Court to consider the issues of whether they can be sued under 42 U.S.C. § 1983. First, they argue that because Title IX has a "comprehensive enforcement scheme" respondent is precluded from suing them under that section. Second, petitioners assert that the Circuit Court wrongfully "assumed" that they can be sued under § 1983. Third, they argue that the Circuit Court did not properly apply the "heightened pleading standard" necessary in analyzing respondent's § 1983 claims. These arguments are all without merit, as will be shown, seriatim, below.

1. *No Comprehensive Enforcement Scheme*

This Court has expressly held that Title IX does *not* contain a remedial scheme comprehensive enough to cure intentional discrimination against a student victim. *See Franklin v. Gwinnette County Public Schools*, 503 U.S. 60, 74-76 (1992). In *Franklin*, the Court held that monetary damages had to be made available for an injured Title IX plaintiff, or she would be "remediless." *Id.* at 76. This decision was based on the deeply rooted legal principle that courts must *presume* "the availability of all appropriate remedies" under a federal statute,

unless Congress has expressly indicated otherwise. *Id.* at 66, citing *Davis v. Passman*, 442 U.S. 228, 246-247 (1979). Congress has made no such indication in relation to Title IX. This Court earlier addressed the lack of comprehensiveness of Title IX's enforcement scheme in *Cannon v. University of Chicago*, 441 U.S. 677 (1978), as follows:

> [The Court has] never withheld a private remedy where the statute explicitly confers a benefit on a class of persons and where it does not assure those persons the ability to activate and participate in the administrative process contemplated by the statute. . . . Title IX not only does not provide such a mechanism, but the complaint procedure . . . does not allow the complainant to participate in the investigation or subsequent enforcement proceedings. Moreover, even if those proceedings result in a finding of a violation, a resulting voluntary compliance agreement need not include relief for the complainant.

Id. at 706 n.41 (citations omitted). Therefore, Title IX does not contain a comprehensive enforcement scheme sufficient to preclude a Section 1983 action.

2. *Correct Assumption*

Petitioners allege that the Circuit Court wrongfully "assume[d] without any analysis" that they could be sued under 42 U.S.C. § 1983. This is exactly the correct assumption for a court to make when confronted with a qualified immunity defense. In the recent case of *Crawford-El v. Britton*, this Court pointed out that in the leading case on qualified immunity, *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), as well as others, the courts correctly "assumed that [the plaintiff] would be entitled to prevail but for the immunity defenses." *Crawford-*

El v. Britton, 118 S. Ct. 1584, 1592 (1998), citing *Siegert v. Gilley*, 500 U.S. 226 (1991). Petitioners appear to confuse *Siegert's* requirement that the court determine whether respondent has "asserted" a violation of a constitutional (or statutory) right with the requirement that the court ultimately determine whether respondent has "proven" her claim. The Circuit Court did not conclusively "[establish] a Section 1983 cause of action" against petitioners. Its decision, therefore, is not in "direct conflict" with either the Third Circuit in *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3rd Cir. 1990) and *Williams v. School Dist. Of Bethlehem*, PA, 998 F.2d 168 (3d Cir. 1993), *cert. denied*, 510 U.S. 1043 (1994) nor the Seventh Circuit in *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996). Each of these cases involved an appeal of summary or final judgment and had nothing whatsoever to do with qualified immunity.

3. *Correct Application of Standard*

Petitioners incorrectly assert that the Circuit Court did not "properly [apply]" the "heightened pleading standard" requiring that respondent state "nonconclusory allegations of their intent" to discriminate against her on the basis of her sex. As explained by this Court in *Crawford-El v. Britton*, *supra*, 118 S. Ct. at 1596, this is not the *circuit court's* job to do:

> "[w]hen a plaintiff files a complaint against a public official alleging a claim that requires proof of wrongful motive, the *trial court* must exercise its discretion in a way that protects the substance of the qualified immunity defense" and "may insist that the plaintiff put forward specific, nonconclusory factual allegations" that establish improper motive . . . causing injury in order to survive a prediscovery motion for dismissal.

Id. at 1596-97, citing *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (KENNEDY, J., concurring in judgment) (emphasis added). The District Court below expressly analyzed this question and determined that respondent had, in fact, met this standard against petitioners. Pts' App C at 40a-48a. The District Court's careful exercise of its discretion in this regard is illustrated by the fact that it required respondent to amend her Complaint to allege more specific nonconclusory facts of intentional discrimination against three other defendants, and when she couldn't sufficiently allege such facts, dismissed these defendants from the case. Pts' App C at 47a, note 21, 48a, note 22, 55a, note 28.

C. The Circuit Court Correctly Determined That In 1992-93 A Reasonable School Official Would Have Known That Pervasive Sexual Harassment Of Respondent By Her Male Student Teacher And Peers Would Violate Her Federal Civil Rights.

As pointed out above, this Court's decision in *Franklin v. Gwinnett County Public Schools*, was not the "sole ground" for the Circuit Court's denial of qualified immunity in this case. The Court also relied on the statutory language of Title IX and the Equal Protection Clause, and cases establishing and interpreting respondent's right to freedom from purposeful sex discrimination under them, recognized "[w]ell prior to 1988." Pts' App A at 6a-11a. The circuit court did focus its Title IX analysis on the *Franklin* case, recognizing its importance in treating Title IX and Title VII as "analogous for purposes of sexual harassment claims." Pts' App A at 7a. Of special interest to the Circuit Court was the fact that this Court relied on the leading Title VII "hostile environment" case, *Meritor Sav. Bank, FSB v. Vinson*, in support of its decision in *Franklin*, a Title IX case. This caused the Circuit Court to believe that the *Franklin* case had established that school officials had a duty to "remedy known sexual harassment under Title IX," similar

to an employer's duty under Title VII. Pts' App A at 7a-8a. Because the Ninth Circuit had also expressly held that "hostile environments include[d] peer harassment" in the Title VII context in *Ellison v. Brady*, 924 F.2d 872, 878 (9th Cir. 1991), it concluded that in its Circuit, at least, the law was clearly established in the 1992-93 school year that petitioners had a "duty to take reasonable steps to remedy a known hostile environment created by a peer." Pts' App A at 9a, 10a.

A court may refer to decisions in the Courts of Appeals to determine whether a right was "clearly established." *See Mitchell v. Forsyth*, 472 U.S. 511 (1985). Courts of Appeals decisions are certainly "relevant authority" in a qualified immunity inquiry. *Elder v. Holloway*, 510 U.S. 510, 516 (1994). A defendant is not entitled to qualified immunity if the "contours of the right [violated are] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson v. Creighton*, 483 U.S. 635, 640 (1987). In fact,

> "general statements of law" may give "fair and clear warning" of a constitutional or statutory right, and "a general constitutional [or statutory] rule already identified in the decisional law" may apply with obvious clarity to the specific conduct in question, even though "the very action in question has [not] previously been held unlawful."

United States v. Lanier, 137 L. Ed. 2d 432, 446 (1997), citing *Anderson, supra*, 483 U.S. at 64.

In *Lanier*, this court considered a Sixth Circuit Court of Appeals' reversal of a state judge's conviction of criminally violating the constitutional rights of five women by sexually

assaulting them while serving as judge.[1] *United States v. Lanier*, *supra*, 137 L. Ed. 2d 432. The jury found that the defendant had deprived the victims of the Fourteenth Amendment due process right to liberty, which included the right to be free from sexually motivated physical assaults and coerced sexual battery. *Id.* at 440. A panel of the Court of Appeals for the Sixth Circuit affirmed the conviction, but the full Court vacated that decision and granted rehearing en banc. *Id.*

On rehearing, the Sixth Circuit Court set aside the convictions for lack of any notice to the public that the criminal statute in question covered simple or sexual assault crimes, holding that liability could only be imposed if the constitutional right said to have been violated had been specifically "identified in a decision of [the Supreme Court]" and held to apply in a factual situation "fundamentally similar" to the one at bar. *Id.* This Court granted certiorari to review the standard for determining when particular conduct "falls within the range of . . . liability . . . [under a federal statute]". *Id.* at 441.

The *Lanier* Court vacated and remanded, holding that the Sixth Circuit had applied the "wrong standard" in determining liability, by crafting a standard substantially higher than the "clearly established" standard used for qualified immunity in civil cases under 42 U.S.C. § 1983. *Id.* at 445. This Court noted that in many cases, "neither the [federal] statutes nor . . . their constitutional referents delineate the range of forbidden conduct [under them] with particularity" and indicated that the "touchstone is whether the statute, either

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1. While this case involved a violation of 18 U.S.C. § 242 (making it a criminal offense to act willfully and under color of law to deprive a person of rights protected by the Constitution or laws of the United States) and the Judge's alleged violation of the due process clause of the Fourteenth Amendment, the Court analyzed it under the "clearly established" rule under 42 U.S.C. § 1983.

standing alone or as construed by the courts, made it reasonably clear . . . that the conduct was [wrong]." *Id.* at 438. Thus, in some cases a "general constitutional rule" previously identified in decisional law may apply to conduct in question, even though "the very action in question has [not] previously been held unlawful." *Id.* at 446, citing *Anderson v. Creighten*, *supra*, 483 U.S. at 640.

Based upon this analysis, this Court should find that respondent's constitutional and statutory right to be free from discrimination, harassment and retaliation, because of her gender, was clearly established in 1992-93.

While not controlling, it is important to examine this Court's recent Title IX decision in *Gebser v. Lago Vista Independent School District*, in analyzing this issue. *Gebser* addressed the question of when a school district may be held liable under Title IX for a teacher's sexual harassment of a student.[2] This Court rejected agency principles resting on respondeat superior or constructive notice and held, instead, that an educational institution's liability rests on its own "official decision . . . not to remedy the violation." *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1997 (1998). Thus, a Title IX violation occurs when a school official with authority to address and correct gender discrimination

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2. While the plaintiffs in *Gebser* originally asserted 42 U.S.C. § 1983 claims against the school district and its teacher, summary judgment was granted in favor of defendants on these claims by the District Court for the Western District of Texas and plaintiffs appealed only their Title IX claim against the District to the Fifth Circuit Court of Appeals and, ultimately, this Court. *Gebser v. Lago Vista Independent School District*, *supra*, 118 S. Ct. 1989, 1993-1994 (1998). Consequently this Court expressly stated that the decision "does not affect any right of recovery that an individual may have against [a] teacher in his individual capacity under . . . § 1983." *Id.* at 2000.

has actual knowledge of it and fails to adequately respond. *Id.* at 1999.[3] This holding is strikingly similar to the Circuit Court's decision in the instant case that school officials may be liable "for their own discriminatory actions in failing to remedy a known hostile environment." Pts' App. A at 9a. Thus, both this Court and the Ninth Circuit have held that, whether directly under Title IX, or under Section 1983, petitioners can only be held liable for their own wrongful acts, not those of "third parties."

D. The Questions Whether Petitioners Can Be Sued Under 42 U.S.C. § 1983 and Whether Title VII Standards Are An Appropriate Analogue For Title IX Liability Should Not Be Considered By This Court.

Petitioners seek expedited review of the questions whether they can be sued under 42 U.S.C. § 1983 and whether Title VII standards should be applied in their Title IX case. In order to obtain this review, petitioners must show not only that the petition has merit under generally applicable standards for granting certiorari (Rules of the Supreme Court, Rule 10), but also that the "imperative public importance of the case" and the "immediate need for Supreme Court Review" justify the Court's deviation from the normal flow of appellate review. Rules of the Supreme Court, Rule 11, 6 Moore's Federal Practice § 511.02 [2] (Matthew Bender 3d ed.). Petitioners cannot meet either of these requirements.

This Court should not consider petitioners' first and second "Questions Presented" because neither was squarely addressed by the Circuit Court and neither is ripe for review. While the

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3. The lack of response by the District must amount to "deliberate indifference" to the discrimination suffered by the plaintiff in order to be actionable. *Gebser v. Lago Vista Independent School District, supra,* 118 S. Ct. at 1999.

Court implied that respondent could state a § 1983 claim against petitioners, it certainly did not issue a "final judgment" on the question. Similarly, while the Court stated that it believed that "Title VII standards apply to hostile environment claims under Title IX," it specifically refused to consider "what steps school officials may reasonably be required to take to address harassment by fellow students," "when they are required to take them," and/or the extent to which any such steps "may differ from the action reasonably expected of employers to remedy harassment by fellow employees."

A writ of certiorari should issue only in "extraordinary circumstances" where the petitioner has shown that the right to issuance is "clear and undisputable" and that he has "no other adequate means to attain the relief he desires." *Will v. Calvert Fire Insurance Co.*, 437 U.S. 655, 665 n.7 (1978). It is in the interest of "fair and prompt administration of justice" to discourage piecemeal litigation because Congress has determined that as a general rule appellate review should be postponed until after a "final judgment" has been rendered by the trial court. *Kerr v. United States District Court*, 526 U.S. 394, 402-403 (1976). A judicial readiness to issue a writ in anything other than an "extraordinary situation" runs the risk of defeating this Congressional intent. *Id.*

While petitioners assert that there are a number of Circuit Court decisions in "direct conflict" with this case on the above-stated questions, this is simply not true. Each of the cases they cite in support of granting the writ on these issues have significant procedural, factual, and legal differences. For example, *Davis II* and *Rowinski* involved appeals of a *dismissal* and *summary judgment*, respectively, in favor of a school board and district, of Title IX claims for student-on-student harassment. Neither case dealt with the preliminary procedural issue of qualified immunity for school employees. Similarly, *Pfeiffer*

and *Waid* each involved an appeal of a *judgment* (the first a trial judgment and the second a summary judgment) in favor of defendant, holding that plaintiff could not bring a § 1983 claim in conjunction with a Title IX claim. The issue of qualified immunity was not addressed in either case.

A mere inconsistency in dicta or general principles utilized by two circuit courts does not suffice to grant certiorari; the conflict must be "real" and "intolerable." Stern, et al., *Supreme Court Practice*, 7th ed. § 2.11. Justice Brennan said that this Court has "made mistakes in granting certiorari at an interlocutory stage," when allowing the case to proceed to its final disposition "might produce a result that makes it unnecessary to address an [important and difficult question]". Justice Brennan, *Some Thoughts On The Supreme Court's Workload*, 66 JUDICATURE 230, 231-32 (1983). Thus, he believed that this Court should not address issues "if there is a way properly to avoid doing so." *Id.* If further proceedings might affect the issue on which certiorari is sought, the Court should ordinarily deny the writ. *Virginia Military Institute v. United States*, 508 U.S. 946 (1993). A case is not ripe for review when there is no justiciable controversy, in its current posture, before the Court. *Anderson v. Green*, 115 S. Ct. 1059, 1060 (1995).

The fact that petitioners are only able to point to two (2) Circuit Court decisions allegedly in conflict over each of the above-stated questions illustrates why this Court should not grant review. While Title IX jurisprudence is a rapidly developing area of law, there has been insufficient time for the Courts of Appeal to fully analyze the above-stated questions, perhaps reach a consensus, and/or develop a satisfactory majority view among the lower courts. This is particularly true in light of this Court's recent decision in *Gebser v. Lago Vista Independent School District*, *supra*, deciding the standard of

liability to be imposed on school districts for violations of Title IX in teacher-on-student sexual harassment cases.

When there are cases pending in the lower courts that may well resolve a conflict, or more clearly frame the issue that is the subject of a conflict, certiorari may be denied notwithstanding the existence of the conflict. *See* Prettyman, *Opposing Certiorari in the United States Supreme Court*, 61 U. Va. L Rev. 197, 202 (1975). Differing rules of federal law in various sections of our great country is "not always an intolerable evil" because the existence of conflicting interpretations may help illuminate an issue before it is finally resolved and, ultimately, play a constructive role in the lawmaking process. Justice Stevens, *Some Thoughts On Judicial Restraint* 66 JUDICATURE 177, 183 (1982).

The doctrine of judicial restraint teaches that patience in the judicial resolution of conflicts may sometimes produce the most desirable results. *Id.* Thus, a conflict of decisions should only result in the granting of a writ where is it clear that the conflict is one that can be effectively resolved "by the Supreme Court alone" and the disagreement among the lower courts is one that must be promptly resolved. Harlan, *Manning The Dikes*, 13 Record of N.Y.C. Bar Ass'n. 541, 552 (1958). There are no such compelling reasons in this case, and therefore, petitioners' writ should be denied.

If petitioners' writ of certiorari is denied at this, the interlocutory stage, they are not prejudiced to renew the questions presented when they later seek a writ from the final judgment. *Urie v. Thompson*, 337 U.S. 163, 172-73 (1949).

CONCLUSION

For all of the foregoing reasons, respondent respectfully requests that the Court deny petitioners' writ of certiorari in its entirety. If the Court is not inclined to deny the writ, then respondent requests that the Court grant the writ, vacate the judgment below, and remand the case for reconsideration in light of *Gebser v. Lago Vista Independent School District*, *supra*.

Respectfully submitted,

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MOTION FILED
AUG 19 1998

(3)

No. 98-101

In The

Supreme Court of the United States

October Term, 1997

PATRICIA McCAFFREY, GERALD HILL and RONALD LUNDY,

Petitioners,

v.

OONA R.-S., A MINOR, BY KATE S., HER GUARDIANS, KATE S. AND KEN R.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

MOTION BY REDWOOD EMPIRE SCHOOLS INSURANCE GROUP FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* SUPPORTING PETITIONER

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22 pp

QUESTION PRESENTED

Whether Congress intended that all student interaction is an education "program or activity" as set forth in Title IX of the Education Amendments of 1972, 20 U.S.C. 1681(a).

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE*

REDWOOD EMPIRE SCHOOLS INSURANCE GROUP (hereinafter "RESIG") respectfully moves for leave to file the attached brief *amicus curiae* in this case. The consent of the attorney for Petitioners has been obtained.[1] The consent of the attorney for Respondent has been refused.

The interest of RESIG in this case arises from the following:

1. RESIG is a joint powers insurance public authority comprised of 43 public school districts in Sonoma County, California, including Petitioners' employer district, with some 80,000 students. RESIG is organized pursuant to statutory authority found at §§ 6500, *et seq.*, of the California Government Code.

2. RESIG filed an *amicus curiae* brief with the Court of Appeals below and participated in the oral argument on the issue presented in this brief: whether the statutory construction and legislative history of Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681, *et seq.*, precludes all student conduct as constituting a grant recipient's "program or activity";

3. Counsel of Record were co-counsel, with Larry J. Frierson, in the first federal student-to-student sexual harassment lawsuit filed under Title IX. *Doe v. Petaluma City School Dist.*, 830 F.Supp. 1560 (N.D.Cal.1993); *Doe v. Petaluma City School Dist.*, 54 F.2d 1447 (9th Cir. 1995); *reconsidered and revised, Doe By and Through Doe v.*

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[1] Consent by Petitioners is filed herewith.

Petaluma City School Dist., 949 F.Supp. 1415 (N.D.Cal.1996). If the Petition is granted, *Amicus* will request participation in oral argument on the singular issue of Title IX's statutory construction.

In the Court of Appeals Petitioners argued primarily as to the grounds for granting qualified immunity, and deferred to *amicus curiae* RESIG all argument with respect to the statutory construction and legislative history of Title IX. Likewise, the Petition for Writ of Certiorari does not address the statutory issues raised in *amicus'* attached brief submitted for this Court's consideration. If the arguments presented by *amicus curiae* are accepted, those grounds would be dispositive of this case.

Date: August 19, 1998

Respectfully submitted:

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TABLE OF CONTENTS

Page

QUESTION PRESENTED i

OPINIONS BELOW 1

STATUTORY PROVISIONS INVOLVED 1

INTRODUCTION AND INTEREST OF *AMICUS CURIAE* 1

STATEMENT OF THE CASE 5

ARGUMENT 8

CONGRESS DID NOT CONTEMPLATE THAT ALL STUDENT CONDUCT CONSTITUTES A "PROGRAM OR ACTIVITY" UNDER TITLE IX AND THEREBY EXPOSING GRANT RECIPIENTS TO DAMAGES LIABILITY FOR ACTIONS OF NON-AGENTS 8

1. Inclusion of All Student Conduct as a "Program or Activity" Is Not Supported by the Legislative History 10

2. Title IX Liability Based upon Student Conduct Finds No Support in Title IX's Post-Enactment History .. 12

3. OCR Misconstrues Title IX as Encompassing Student Conduct 15

   a. Historically Title IX Regulations Have Been Adopted for Discrete Programs and Activities 16

   b. OCR Has Consistently Acknowledged That No Policies Have Been Adopted 17

CONCLUSION 20

INDEX TO APPENDICES

		Page
APPENDIX A	20 U.S.C. §§1681, *et seq.* ..... App.	1
APPENDIX B	34 C.F.R. §§106, *et seq.* ..... App.	16
APPENDIX C	Civil Rights Restoration Act of 1987..... App.	44
APPENDIX D	Senate Report (Labor and Human Resources Committee) No. 100-64.. App.	54
APPENDIX E	Letter from Scolaro, Shulman, Cohen, Lawler, Burstein & Ferrara, P.C., dated October 26, 1993 to Office for Civil Rights..... App.	119
APPENDIX F	Letter from Attorney Advisor, Office for Civil Rights, undated to Scolaro, Shulman, Cohen, Lawler, Burstein & Ferrara, P.C. ..... App.	121
APPENDIX G	OCR Policy Memorandum from A. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981) ..... App.	123
APPENDIX H	Dept. of Education, Office of Civil Rights, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed.Reg. 12034, 12039 (1997) ("1997 Policy Guidance") ..... App.	140

INDEX TO APPENDICES – Continued

Page

APPENDIX I — Letter from John E. Palomino, Regional Civil Rights Director, Dept. of Education, to Charles Cadman, Superintendent, Petaluma City School District, dated May 5, 1989..... App. 180

APPENDIX J — Dept. of Education Press Release dated July 1, 1998.....App. 192

TABLE OF AUTHORITIES

Page

CASES

Cannon v. University of Chicago, 441 U.S. 677 (1979)..*passim*

Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (*en banc*) (*petition for cert. filed*, November 19, 1997).....5, 6

Doe v. Petaluma City School Dist., 830 F.Supp. 1560 (N.D.Cal. 1993) 17

Doe v. Petaluma City School Dist., 54 F.2d 1447 (9th Cir. 1995) 18

Doe v. Univ. of Illinois, 138 F.3d 653 (7th Cir. 1998) ...3, 7

Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992).....7, 8, 11

Gebseret Al. v. Lago Vista Independent School District, No. 96-1866 (June 23, 1998), 66 U.S.L.W. 4501 ..... *passim*

Grove City College v. Bell, 465 U.S. 555 (1984)... *passim*

North Haven v. Bell, 456 U.S. 512 (1982)..... *passim*

Pennhurst State School & Hosp. v. Halderman, 451 U.S. 1 (1981).....13, 15

Rowinsky v. Bryan Indep. School Dist., 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996) .....*passim*

Tinker v. Des Moines Independent Com. Sch. Dist., 393 U.S. 503 (1969)..... 19

Wood v. Strickland, 420 U.S. 308 (1975) 19

STATUTES AND RULES

20 U.S.C. 1601(a)(6)-(9) (1994)..... 13

34 C.F.R. pt. 86 (1972) 16

TABLE OF AUTHORITIES – Continued

Page

34 C.F.R. §§106.31, *et seq.* ..... *passim*

42 U.S.C. §1983 3

Civil Rights Restoration Act of 1987 4

Fed.R.Civ.P. 12(b)(6) 5

Pub.L No. 93-380 § 844, 88 Stat. 612 (1974) 16

Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. § 2000d-7(a)(1) 13

Supreme Court Rule 37 2

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, *et seq.*) ..... *passim*

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.* 6, 11

CONSTITUTIONAL PROVISIONS

First Amendment to the U.S. Constitution 19

U.S. Const., Art. I, §8, cl.1 6

Eleventh Amendment to the U.S. Constitution 13

Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution 5

OTHER

118 Cong.Rec. at 5803 (1972) 11

BRIEF OF *AMICUS CURIAE* -REDWOOD EMPIRE SCHOOLS INSURANCE GROUP

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Oona R.-S. v. McCaffrey,* is reported at 143 F.3d 473 (9th Cir.1998). The opinion of the District Court in *Oona R.-S. v. Santa Rosa City Schools* is reported at 890 F.Supp. 1452 (N.D. Cal. 1995).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 (20 U.S.C. §§1681, *et seq.*) (hereinafter "Title IX") provides, in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . . " 20 U.S.C. §1681(a). App. 1.

INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

Amicus Curiae Redwood Empire Schools Insurance Group submits this brief in support of Patricia McCaffrey, Gerald Hill and Ronald Lundy's Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit. *Amicus* submits this brief for two purposes: First, in support of granting the Petition; and second, to suggest an analytical framework for this Court's consideration of the merits. As explained below, this Petition is pivotal in that unlike other Title IX appellate decisions, a question is presented of qualified immunity for individual defendants. Ultimately, this Court must define the precise contours of Title IX for which no discernable landmarks regarding student conduct currently exist. The posture of this case is ripe for this Court to fashion the proper scope of inquiry with respect to qualified immunity

under Title IX. Consistent with Sup. Ct. Rule 37,[1] the issues briefed by *Amicus* have not been addressed in the Petition for Writ of Certiorari.

All can agree that sexual harassment is a vexing societal problem. Yet the exigencies of a societal issue should not inexorably compel new legal rights and obligations inimical to the practical and fiscal parameters of public education. In *Amicus*' view, Title IX has been administratively and judicially interpreted in directions not contemplated by Congress to such an extent that the term "program or activity" has been rendered meaningless. As Chief Judge Posner of the Seventh Circuit opined in his dissent from denial of rehearing *en banc* in a recently decided student peer sexual harassment case, the question presented is ripe for resolution:

> The issue of a school's liability under 20 U.S.C. §1681(a) (which forbids sex discrimination by schools that receive federal financial aid) for the sexual harassment of one student by another is well worth the attention of the full court, quite apart from the issue of intercircuit conflict. The potential liabilities of the nation's schools, already financially hard-pressed, are staggering, since insults, teasing, petty persecutions, grabbing, poking, sexual experimentation, and other forms of what might actually or arguably constitute sexual harassment are an omnipresent feature of school life. Liability for failing to prevent or rectify sexual harassment of one student by another places a school on a razor's edge, since the remedial measures that it takes against the alleged harasser are as likely to expose the school to a suit by him as a failure to take those measure [sic] would be to expose the school to a suit by the victim of the alleged harassment.

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[1] Pursuant to Rule 37.6, this brief was written solely by counsels of record Kivel and Henry on behalf of and funded by *Amicus*.

Doe v. Univ. of Illinois, 138 F.3d 653, 679 (7th Cir. 1998).

Amicus has significant interest in the case at bar. If the opinion below is allowed to stand, the filing of sexual harassment lawsuits by students against public school officials will undoubtedly increase, with profound financial and public policy ramifications for public schools. Of equal concern to *Amicus* is *threatened* litigation, based upon a claimant's hope to obtain an expedited "settlement" against *Amicus*' member school districts which may wish to avoid significant defense litigation costs. In addition, *Amicus* is concerned about the chilling effect that Title IX sexual harassment cases have on individual administrators, teachers and counselors, if actions are allowed to proceed on a 42 U.S.C. §1983 basis against public educators in their individual capacities.[2] These actions (1) undermine the fiscal integrity of public schooling by diverting financial resources from educational needs to litigation; (2) cause individual educators to fear that their every word, action, inaction or physical contact may be the future basis for a lawsuit; (3) hold school officials accountable on a bright line distinction between "harassment" and First Amendment protected speech amongst students where courts have been unable to define the precise contours of such discourse; and (4) subvert the personal interactions between

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[2] In light of the development of judicial decisions interpreting Title IX and this Court's recent Title IX decision in *Gebseret Al. v. Lago Vista Independent School District*, No. 96-1866 (June 23, 1998), 66 U.S.L.W. 4501, *Amicus* further suggests that although the time may be ripe for this Court to reconsider its *Cannon* holding that a private right of action is implied under Title IX it may be unnecessary: "The Court held in *Cannon v. University of Chicago*, 441 U.S. 677 (1979), that Title IX is also enforceable through an implied private right of action, a conclusion we do not revisit here." 66 U.S.L.W. at 4503. *Amicus* suggests that judicial inferences have taken Title IX too far astray from its legislative intent — an inferred private right of action has led to inferred compensatory damages as a remedy and now to an inferred claim grounded in student conduct. The "program or activity" analysis set forth in this brief offers an alternative method of defining the contours of the implied private right of action.

school officials and students by attempting to define precisely the lawful parameters of how educators must respond to the myriad of interpersonal conflicts which arise on a daily basis within a school environment.[3]

The fundamental question is what constitutes a "program or activity." It is indisputable that both the legislative history of the Civil Rights Restoration Act of 1987 (App. 54) and federal regulations apply Title IX's proscription on sex discrimination to all of an institution's discrete programs and activities. However, Title IX and its regulations do not compel the conclusion that a school district operates a program or activity when students are walking on school grounds, eating lunch, and interacting in a myriad of other non-curricular activities.

Amicus' asserted position that student conduct is not a "program or activity" is consistent with the views expressed by Congress in enacting the Restoration Act where it cited examples of alleged sex discrimination in athletics, employment, harassment by teachers and unequal educational opportunities. App. 74-81.[4] It is also consistent with 20 U.S.C. §1687 (App. 11) interpreting "program or activity"; and with the language of 34 C.F.R. §§106.31, *et seq.* which enumerates regulations governing discrete programs and activities, for example, admissions and athletics. App. 21-43. Moreover, a

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[3] The dissent in Lago Vista opined that holding a school district liable in damages is a risk against which the district, but not the student, can insure. *Id.*, at 66 U.S.L.W. 4510. An insurer is responsible for analyzing potential risk liability inherent in official school programs and activities, such as classroom lectures, athletic events, school dances, and similar discrete activities. However, if "program or activity" under Title IX is deemed to include all student conduct, thus imposing liability for the acts of those who are not in an agency relationship, insurance requirements will become financially prohibitive.

[4] *Amicus*' brief addresses solely the allegations involving student-to-student interaction. Ibach, a *student teacher*, is the only individual defendant other than Petitioners. For purposes of this brief, *Amicus* simply notes that employment has been held by this Court to constitute a program or activity under Title IX.

study of Title IX judicial decisions convinces *Amicus* that they do not support the construction urged by the Court of Appeals below.

STATEMENT OF THE CASE

This case arises out of an action filed in 1994 by Respondent Oona R.-S. against Santa Rosa City Schools and three of its employees who remain as individual defendants after dismissal of other school officials: Patricia McCaffrey, Respondent's sixth grade teacher; Gerald Hill, school principal; and Ron Lundy, Director of Elementary Education for the school district. Two general allegations were raised in Respondent's Complaint for violations of Title IX and the Equal Protection Clause of the Fourteenth Amendment: That Petitioners and their employer (1) failed to adequately address the purported hostile sexual environment created by male students in Respondent's public elementary school class; and (2) failed to remedy allegedly inappropriate conduct by a student teacher.

The individual defendants' Fed.R.Civ.P. 12(b)(6) motion to dismiss based on qualified immunity was denied by the district court and unanimously affirmed in an amended opinion dated August 25, 1997. A Petition for Rehearing with a suggestion for rehearing *en banc* was timely filed, relying upon the subsequently issued Eleventh Circuit's *en banc* decision that a school district is not liable under Title IX for failure to prevent student-to-student hostile environment sexual harassment. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*) (*petition for cert. filed*, November 19, 1997). The *Davis* decision squared with the Fifth Circuit's holding in *Rowinsky v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996). The Court of Appeals below denied the Petition for Rehearing but withdrew its August 1997 opinion and filed a divided opinion, amended May 5, 1998. Hall, J., dissenting. However, the premise upon which the result reached by the Court of Appeals was predicated relied on the proposition that all student conduct implicates Title IX is untenable.

The Ninth Circuit's opinion stands in stark contrast to opinions issued by the Fifth and Eleventh Circuits and does not comport with this Court's recent pronouncements as to Title IX standards.[5] In a Title IX action alleging that a school district and its officials condoned and caused hostile environment sexual harassment by student peers both at school and on the school bus, the Fifth Circuit in *Rowinsky* concluded that a school district is not liable for failing to remediate peer harassment absent a showing that its response treats male and female victims differently (holding that no cause of action exists where a school district merely knew or should have known of peer sexual harassment and failed to act). *Id.* at 1016.

The Eleventh Circuit reached the same result.[6] The divided court concluded that the school district lacked the requisite notice under Spending Clause legislation[7] that as a grant recipient it might incur liability for student conduct. *Id.*, at 1401.[8]

> . . . nothing in the language or history of Title IX suggests that Title IX imposes liability for student-student sexual harassment. [footnote omitted.] Second, the imposition of this form of liability

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[5] This Court's *Lago Vista* decision appears to dispose of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§2000e, *et seq.*, as the appropriate statutory analogue. *Id.*, 66 U.S.L.W. at 4504-4505.

[6] Davis did not appeal the district court's dismissal of her Title IX claim as to the individual defendants. *Davis, supra,* at 1392, n.3. Therefore, as in *Rowinsky*, only the status of the entity defendant was on appeal. *Id.*, at 1010, n.6.

[7] In *Lago Vista* this Court concluded that Title IX was enacted pursuant to the Spending Clause, U.S. Const., Art. I, §8, cl.1 *id.*, 66 U.S.L.W. at 4505. By such action Congress attaches conditions to federal funding under Title IX and thus it is critical to examine the principle of adequate notice prior to holding a recipient liable in monetary damages for noncompliance with a congressional condition.

[8] The *Davis* court also opined that agency principles are irrelevant in discussing liability for student-to-student harassment given that students are not agents of a school district. *Id.*, at 1399-1400, n.13.

> would so materially affect schools' decisions whether to accept Title IX funding that it would require an express, unequivocal disclosure by Congress. *Id.* at 1401 & n.15.

Reaching a different result to *Rowinsky* and *Davis*, the Seventh Circuit in *Univ. of Illinois, supra*, held that school officials are not immune for their "failure to take prompt, appropriate action in response to student-to-student sexual harassment . . . " where school officials have actual knowledge of the impermissible conduct. *Id.*, at 667-668. Contrary to *Lago Vista*, that court relied upon a Title VII analogy and adopted, for actions based upon direct liability, the "knew or should have known" standard. *Id.*, at 665-667.

In the first instance the Court of Appeals below framed the sole issue before it as whether the district court correctly denied qualified immunity for the individual defendants because in 1992-1993 reasonable school officials would have known that the alleged conduct would violate Respondent's federal rights. *Oona, supra,* at 475. The Ninth Circuit acknowledged that its statutory interpretation was contrary to the Eleventh Circuit in *Davis* and the Fifth Circuit in *Rowinsky*.

> We have difficulty squaring the reasoning of those cases with the Supreme Court's in *Franklin* [*v. Gwinnett County Pub. Schs.*, 503 U.S. 60 (1992)] and our own in *Petaluma*. *Rowinsky* and *Davis* imply that school officials differ from employers, and should not be vicariously liable for the actions of peers under agency principles. But neither the employers under Title VII are vicariously liable for the actions of others. Rather, they are liable for their own discriminatory actions in failing to remedy a known hostile environment.
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> *Oona, supra,* at 477.

However, the majority opinion relied on an interpretation of *Franklin* which sweeps too broadly.[9] Justice Hall, in dissent, challenged the majority's conclusion that students have a right under Title IX to be free from peer sexual harassment. *Id.*, at 479. Therefore, it is imperative that this Court provide direction to lower courts to refrain from construing Title IX in such a way so that the phrase "program or activity," a necessarily limiting phrase, is rendered meaningless. In *Amicus*' view, *if that phrase is deemed applicable to peer harassment then there is no conduct or omission between students which would not be covered by Title IX.*

ARGUMENT

CONGRESS DID NOT CONTEMPLATE THAT ALL STUDENT CONDUCT CONSTITUTES A "PROGRAM OR ACTIVITY" UNDER TITLE IX AND THEREBY EXPOSING GRANT RECIPIENTS TO DAMAGES LIABILITY FOR ACTIONS OF NON-AGENTS.

There have been five decisions by this Court addressing Title IX since its enactment. In 1979, this Court held that Title IX was enforceable by an individual through an implied private right of action. *Cannon, supra* (prospective female medical student claimed sex discrimination in admission policy). This Court reviewed the statute's legislative history:

> Title IX, like its model Title VI, sought to accomplish two related, but nevertheless somewhat different, objectives. First, Congress wanted to avoid the *use of federal resources to support discriminatory practices;* second, it wanted to provide individual citizens effective *protection against*

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[9] Misreading this Court's *Franklin* opinion by imbuing it with a broader reach than this Court had intended, the Ninth Circuit adopted a Title VII analogy for Title IX cases. *Oona, supra,* at 477 ("The holding adumbrated by the majority in *Franklin* is required today: Title VII standards apply to hostile environment claims under Title IX.") The conclusion of the court below was rejected by this Court's recent *Lago Vista* decision.

> *those practices*. Both of these purposes were repeatedly identified in the debates on the two statutes." *Id.*, at 704. [Emphasis added; footnote omitted.]

The initial purpose was addressed through statutory procedures for the termination of federal financial support engaged in discriminatory practices. *Ibid.* In support of its conclusion that a private right of action existed, this Court opined that in an isolated violation neither the administrative agency or a private litigant should bear "the burden of demonstrating that *an institution's practices are so pervasively discriminatory* that a complete cutoff of federal funding is appropriate." *Id.*, at 705 [emphasis added.] And, with respect to anticipated future conflicts, as here, regarding the reach of this judicially implied private right of action, the concurrence suggested a cautionary approach:

> Not only is it "far better" for Congress to so specify when it intends private litigants to have a cause of action, but for this very reason this Court in the future should be extremely reluctant to imply a cause of action absent such specificity on the part of the Legislative Branch.
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> *Id.*, at 718. J. REHNQUIST, concurring.

In this Court's second Title IX opinion, *North Haven v. Bell*, 456 U.S. 512 (1982), employment discrimination was held to be violative of Title IX. This Court noted that Title IX contains two "core provisions," the first of which is a *program-specific* prohibition of gender discrimination. *Id.*, at 514.[10] The *North Haven* Court thoroughly analyzed the

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[10] In the *Lago Vista* oral argument, this Court questioned whether Title IX did not require institutional policy to implicate Title IX. *See* Tr. of Oral Arg. at 21-22:

> QUESTION: Why shouldn't we require that the district, in order to be liable, have a policy that permits discrimination, that affirmatively permits it?
>
> The way the statute reads, it says no one shall be excluded from participation and be denied the benefits of or be subject to

legislative history[11] of Title IX, a statute introduced by Senator Bayh which was designed to prohibit gender discrimination in federally funded education programs and to close

> loopholes in existing legislation relating to general education programs and employment resulting from those programs. . . . The amendment would cover such crucial aspects as admissions procedures, scholarships, and faculty employment. . . .
>
> *Id.*, at 524.

1. Inclusion of All Student Conduct as a "Program or Activity" Is Not Supported by the Legislative History.

Consistent with its text, Title IX's legislative history contains no indication at all that student-to-student sexual harassment constitutes gender discrimination in a grant recipient's "program or activity." The express statutory means of Title IX's enforcement are administrative. Federal agencies are directed to predicate education funding upon compliance with nondiscrimination requirements. Enforcement is through "any . . . means authorized by law," including ultimately termination of federal funding. 20 U.S.C. §1682. App. 9. By implying a legislative history that does not exist, the Court of Appeals below broadens the scope of Title IX's coverage

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> discrimination *under any educational program or activity, not in connection with it, under*, and I thought it was mainly directed at educational programs that allow sports for boys, no sports for girls, things of that sort. *That is discrimination under the program.*" . . .

[11] *Amicus* acknowledges that the Restoration Act legislatively revised the analysis of "program or activity" as held in *North Haven, supra*, and *Grove City College v. Bell*, 465 U.S. 555 (1984). Therefore, *Amicus* cites *North Haven* not for its precise holding, but rather for its analytical framework regarding "program or activity" and for its analysis of Title IX's legislative intent.

beyond congressional intent; therefore it is proper for this Court to define the contours of that liability.[12]

Title IX was offered as a floor amendment. Therefore, administrative agency and judicial interpretations of congressional intent regarding the reach of Title IX cannot rely on the most dependable sources of legislative intent, generally reflected by the reports of the responsible House and Senate committees. This sparse legislative history argues in favor of not reading into the statute damages liability of a grant recipient for conduct of students. As noted by the *Rowinsky* court, the legislative history demonstrates that both supporters and opponents of Title IX focused exclusively on acts by grant recipients, noting that Senator Bayh introduced the amendment while enumerating the forms of discrimination, *all by grant recipients*, which fostered the legislation. 118 Cong.Rec. at 5803 (1972). ("It is clear to me that sex discrimination reaches into all facets of education – admissions, scholarship programs, faculty hiring and promotion, professional staffing, and pay scales.") *Rowinsky*, at 1014. While recognizing that the statements of one legislator made during a debate may not be controlling, the *Rowinsky* court opined that "Senator Bayh's remarks, coming from the sponsor of the language ultimately enacted, have been treated as authoritative to the statute's construction." *Id.*, at 1014, *citing North Haven, supra*, 456 U.S. at 526-527. Further, the *Rowinsky* court cited to the original amendment's mandated study of sex

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[12] As this Court noted, "[u]nlike Title IX, Title VII contains an express cause of action, Sec. 2000e-(f), and specifically provides for relief in the form of monetary damages, Sec. 1981a. Congress therefore has directly addressed the subject of damages relief under Title VII and has set out the particular situations in which damages are available as well as the maximum amounts recoverable. Sec. 1981a(b)." *Lago Vista, supra*, 66 U.S.L.W. at 4504. *Amicus* recognizes that Title IX's legislative history also lacks any reference to teacher-student harassment. However, as demonstrated by this Court's *Franklin* and *Lago Vista* decisions, agency principles may impute liability to a grant recipient for conduct by an employee.

discrimination which purpose was to suggest further legislative remedial action. *Ibid.*

The Eleventh Circuit also reviewed Title IX's legislative history and the same result obtained. *Davis, supra*, at 1395-1397. That court noted that peer harassment was never a subject of discussion in (1) congressional testimony during hearings in 1970 on gender discrimination in federally funded educational programs; (2) in a 1971 House report and related testimony; or (3) when both House and Senate bills on gender discrimination were introduced and debated. *Id.*, at 1396-1397. "[T]hroughout this long legislative history, the drafters of Title IX never discussed student-student sexual harassment or the related issue of school discipline. *Id.*, at 1397.[13] In the case at bar, the Court of Appeals below affirmed without commenting on Title IX's legislative history.

2. Title IX Liability Based upon Student Conduct Finds No Support in Title IX's Post-Enactment History.

As the *Cannon* Court concluded, although post-enactment legislative developments cannot be accorded "the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions concerning the scope and purpose of Title IX. . . . " *Id.*, at 687 n.7. However, there is no support in Title IX's post-enactment history that liability may be predicated upon student conduct.

Congress has revised Title IX during its 26-year history generally to broaden its protective umbrella or arguably to retain the statute's intended status quo. In *Grove City*, this Court held, *inter alia*, that the receipt of federal grants by some of a college's students placed only the financial aid program, rather than the entire college, under Title IX's requirements prohibiting sex discrimination. That decision was subsequently legislatively overturned by Congress when

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[13] With respect to inclusion of student conduct, *Amicus* has been unable to identify any legislative reference to a non-agent's acts or omissions as a contemplated basis for either enacting Title IX or for imposing liability.

it restored the jurisdictional coverage to any program or activity within an educational institution when any part of the institution receives federal funding. 20 U.S.C. §1687 (1994).

The Restoration Act amended Title IX by adding a broader definition of the term "program and activity." Yet, the Restoration Act and its legislative history are silent as to imposition of liability on an educational institution for purely private conduct between students.[14] App. 44-54. Indeed, as amended by the Restoration Act, Title IX's statutory language expresses Congress' intent insofar as to the extent of the proscribed discrimination. 20 U.S.C. §1687 provides that the terms "program or activity" and "program" *mean all of the operations of*

> . . . (2)(B) a local educational agency (as defined in section 8801 of this Title), system of vocational education, or other school system; . . . . (Emphasis added) App. 11, 45.

At that point in time, some fifteen years after adoption of Title IX, Congress could have addressed the subject of whether student conduct violates Title IX. Yet Congress to date has never even debated this issue. Congress knows how to speak to an issue:

> Indeed, in those instances where Congress has intended the states to fund certain entitlements as a condition of receiving federal funds, it has proved capable of saying so explicitly.
>
> *Pennhurst State School & Hosp. v. Halderman*, 451 U.S. 1, 17-18 (1981).

See also Rehabilitation Act Amendments of 1986, 100 Stat. 1845, 42 U.S.C. 2000d-7(a)(1) (abrogating the States' Eleventh Amendment immunity and again silent on student conduct under Title IX).

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[14] There have been other statutory revisions which similarly reflect an absence of Congress' contemplation of student conduct as a basis for Title IX liability, such as protection for longstanding same-sex activities as the Boy Scouts of America, or father-daughter dances. 20 U.S.C. §1601(a)(6)-(9) (1994). App. 2-4.

In 1992, this Court held that private plaintiffs could seek monetary damages against a school based upon Title IX for intentional discrimination against a student by a teacher. *Franklin, supra.* In the fifth and most recent pronouncement as to the scope of Title IX, this Court held in *Lago Vista* that damages are unavailable for teacher-student sexual harassment absent actual notice to a school district official with authority to implement corrective measures, and whose conduct demonstrates deliberate indifference to the teacher's misconduct. *Id.*, 66 U.S.L.W. at 4506.[15] However, to allow student conduct to form a basis for Title IX liability,[16] *Amicus* suggests, would be inconsistent with this Court's conclusion

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[15] *Amicus* anticipates the construct of a counter-argument: That an institution is responsible for its own conduct in knowingly allowing an allegedly hostile and discriminatory environment to continue once it is on notice that peer harassment is occurring. In other words, that a failure to stop or prevent student-to-student sexual harassment by a grant recipient's official with (1) actual knowledge and (2) authority to take corrective action (which could include all adults in a school environment, from yard and cafeteria supervisors to classroom teachers and administrators) constitutes a "program or activity." This argument is based on the proposition that a school district should be liable in damages under Title IX where a school official " 'aided in carrying out the sexual harassment of students by his or her position of authority with the institution. . . . ' " Dept. of Education, Office of Civil Rights, ("OCR") Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed.Reg. 12034, 12039 (1997) (hereinafter "1997 Policy Guidance") App. 140, 173, 176-178.

Subsequent to this Court's *Lago Vista* decision, the United States Department of Education continues to maintain that student-to-student sexual harassment violates Title IX. App. 192. However, OCR's view renders the phrase "program or activity" meaningless.

[16] *Amicus* notes that this "Policy Guidance" is not a set of rules and regulations adopted through a notice and comment procedure, and therefore again fails to provide adequate notice to grant recipients or to constitute a "laying before" Congress as to OCR's interpretation of Title IX as embracing student conduct. OCR, on the other hand, asserts that these guidelines are "standards" due appropriate deference by the courts. App. 151-153.

in *Lago Vista* that Title IX was enacted under the Spending Clause and would be contrary to this Court's caution to Congress:

> By insisting that Congress speak with a clear voice [as to the conditions grant recipients are assuming upon acceptance of federal funding], we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation [in federal programs]. *Pennhurst, supra*, at 17.

3. OCR Misconstrues Title IX as Encompassing Student Conduct.

The *Grove City* Court opined that:

> [p]ersuasive evidence of Congress' intent concerning student financial aid may also be gleaned from its subsequent treatment of Title IX. We have twice recognized the probative value of Title IX's unique postenactment history, *North Haven Board of Education v. Bell, supra,* at 535 [. . .]; *Cannon v. University of Chicago, supra,* at 687, n.7, 702-703 [. . .], and we do so once again. The Department's sex discrimination regulations made clear that "[s]cholarships, loans, [and] grants . . . extended directly to . . . students for payment to" an institution constitute federal financial assistance to that entity. 40 Fed.Reg. 24137 (1975); see n.6, *supra. Under the statutory "laying before" procedure of the General Education Provisions Act, Pub.L. 93-380, 88 Stat. 567, as amended, 20 U.S.C. Sec. 1232(d)(1) (1982 ed.), Congress was afforded an opportunity to invalidate aspects of the regulations it deemed inconsistent with Title IX.*
>
> *Grove City, supra,* at 567-568 [Emphasis added.]

The OCR is the entity charged with enforcing and effectuating Title IX. The primary interpretation of Title IX is found in its implementing regulations. 34 C.F.R. 106.31 singularly addresses acts by the grant recipient.

> *Specific prohibitions:* Except as provided in this subpart, in providing any aid, benefit, or service to a student, *a recipient shall not,* on the basis of sex: . . . (7) otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Congress has proceeded to amend Title IX when it has disagreed with the agency's interpretation. *North Haven, supra,* at 534, n.25. Here Congress has been denied the opportunity to speak on OCR's interpretation, despite the significant public policy and fiscal ramifications of its actions in finding grant recipients in noncompliance based upon failure to stop or prevent peer harassment by students.[17]

a. Historically Title IX Regulations Have Been Adopted for Discrete Programs and Activities.

Student verbal interactions cannot be deemed an "operation" of a school system for which federal monies are received. Title IX is tied to the *funding* of programs and activities, such as athletics, bilingual education, counseling, and other indicia of institutional structure.

Initially the Department of Health, Education and Welfare was delegated the task of developing Title IX standards for athletic programs. Pub.L. No. 93-380 §844, 88 Stat. 612 (1974). Administrative regulations, regarding such programs or activities such as admissions, textbooks, and athletics, initially appeared at 34 C.F.R. pt. 86 (1972) and were recodified in connection with the establishment of the Department of Education and the transfer of Title IX functions to that agency. *North Haven, supra,* at 515-516 & n.4-5. Proposed Title IX regulations were also published to bring

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[17] "Program or activity" has as a qualifier "no person." If Congress had intended Title IX to include student-to-student sexual harassment interaction as a basis for noncompliance, it needed to have included language other than "no person." Instead, Congress should have included a definition which would satisfy Spending Clause notice requirements.

employment discrimination within Title IX's parameters. A final rule was submitted to Congress for review and this Court later upheld Title IX's reach to include employment discrimination. *Id.*, 456 U.S. at 514. Yet no regulations have been promulgated regarding student conduct. Absent an agency's statutory construction having been "fully brought to the attention of the public and the Congress," with an opportunity for Congress to alter that interpretation, accurate legislative intent cannot be presumed. *North Haven, supra*, at 535 (citation omitted).[18]

b. OCR Has Consistently Acknowledged That No Policies Have Been Adopted.

Under the state of current law, as interpreted by OCR and the Court of Appeals below, a school district is forced to comply with an interpretation of Title IX embracing student conduct which places federal financial assistance at risk. *See* App. 180 for an OCR "Letter of Finding" regarding student-to-student sexual harassment. Letters of findings are written by regional OCR staff members in response to specific investigations triggered by an administrative complaint. *See Rowinsky, supra*, at 1015 [Citation omitted.] Their purpose is to compel voluntary compliance by the recipient institution. *Ibid. And see Doe v. Petaluma City Sch. Dist.* 830 F.Supp. 1560, 1573 (N.D.Cal. 1993) (OCR letter of findings did not address what judicial remedies are available in Title IX action). The Ninth Circuit in *Petaluma* correctly rejected the proposition that an OCR "letter of finding" could create a Title IX right:

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[18] This "laying before" provision was designed to afford Congress an opportunity to examine a regulation and, if it found the regulation "inconsistent with the Act from which it derives its authority . . . ," to disapprove it in a concurrent resolution. If no such disapproval resolution was adopted within 45 days, the regulation would become effective. *North Haven, supra*, at 531- 532.

> The OCR letter in this case neither creates the source of the right sued upon by Doe, nor is it a relevant "precedent" which can clearly establish an official's duty to act. . . .
>
> *Doe v. Petaluma City School Dist.*, 54 F.3d 1447, 1452 (9th Cir. 1995).

Further, OCR has consistently acknowledged that no policies on student peer have been adopted. App. 119-123. The OCR policy statement relied upon by OCR focuses not on student conduct, but rather on conduct by employees or agents of the recipient.

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by *an employee or agent of the recipient*, that denies, limits, provides different, or conditions the provision of aid, benefits, services, or treatment protected under Title IX. *See* OCR Policy Memorandum from A. Califa, Director of Litigation, Enforcement and Policy Service, to Regional Civil Rights Directors (Aug. 31, 1981). [Emphasis added.] App. 123, 125.

Significantly, OCR acknowledged that it was undetermined whether student conduct could trigger a violation:

> The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other students.
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> App. 137.[19]

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[19] *Amicus* asserts that sexual harassment by third parties, absent a showing that the conduct implicates a grant recipient's power, reaches beyond the OCR's jurisdiction. *See* 34 C.F.R. §106.31(b), which provides OCR its jurisdiction over sexual harassment. App. 21-22.

OCR asserts that " . . . OCR's longstanding construction of Title IX . . . " is that peer harassment violates Title IX. App. 176, n.27. However, with respect to administrative letters of finding regarding student peer harassment, their weight, if any, falls short of both implementing regulations and the 1981 Policy Memorandum, which represents a deliberate policy statement, which, according to its own words, reflects consistency with prior agency interpretation. Where an agency's position has not been shown to be consistent over a period of time, or is unclear, then the interpretation is not deserving of deference. *North Haven, supra*, at 522 n.12 & 538 n.29.[20]

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[20] *Amicus* recognizes the profound First Amendment constitutional implications within an academic environment of defining actionable "sexual harassment." *See, e.g., Tinker v. Des Moines Independent Com. Sch. Dist.*, 393 U.S. 503 (1969). *Amicus* is not seeking an avenue to avoid or ignore the conduct proscribed by Title IX, nor is *Amicus* insensitive to the very real damage faced by some targets of harassment. Rather, *Amicus* seeks this Court's guidance in providing a workable framework for the judiciary which recognizes that public educators should be allowed to use the educational *process*, including discipline, to respond to harassment consistent with their professional obligation. Historically this Court has recognized that the federal judiciary should afford latitude to education professionals. *See e.g., Wood v. Strickland*, 420 U.S. 308, 325 (1975). The dilemma faced by educators is demonstrated by the 1997 Policy Guidance, where OCR could offer no meaningful guidance as to the First Amendment. App. 149.

CONCLUSION

Upon these grounds, *Amicus Curiae* Redwood Empire Schools Insurance Group respectfully requests that this Court grant the Petition.

Date: August 19, 1998

Respectfully submitted,

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APPENDIX

20 U.S.C.A. § 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of only one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

(3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

(4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

(5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

(6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices –

> **(A)** of a social fraternity or social sorority which is exempt from taxation under section 501(a) of Title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or
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> **(B)** of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service

organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

(7) Boy or Girl conferences

this section shall not apply to –

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for –

(i) The promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: Provided, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c) "Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

(Pub. L. 92-318, Title IX, § 901, June 23, 1972, 86 Stat. 373; Pub. L. 93-568, § 3(a), Dec. 31, 1974, 88 Stat. 1862; Pub. L. 94-482, Title IV, § 412(a), Oct. 12, 1976, 90 Stat. 2234; Pub. L. 96-88, Title III, § 301(a)(1), Title V, § 507, Oct. 17, 1979, 93 Stat. 677, 692; Pub.L. 99-514, § 2, Oct. 22, 1986, 100 Stat. 2095.)

HISTORICAL NOTES – HISTORICAL AND STATUTORY NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Act. House Report No. 92-554, Senate Report No. 92-604, and Senate Conference Report No. 92-798, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

1974 Act. House Report No. 93-1056 and Senate Conference Report No. 93-1409, see 1974 U.S.Code Cong. and Adm.News, p. 6779.

1976 Act. Senate Report No. 94-882 and House Conference Report No. 94-1701, see 1976 U.S.Code Cong. and Adm.News, p. 4713.

1979 Act. Senate Report No. 96-49 and House Conference Report No. 96-459, see 1979 U.S.Code Cong. and Adm.News, p.1514.

References in Text

This chapter, referred to in subsecs. (b) and (c), was in the original "this title", meaning title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

Amendments

1986 Amendment. Subsec. (a)(6)(A). Pub.L. 99-514 substituted "Internal Revenue Code of 1986" for "Internal Revenue Code of 1954", which for purposes of codification was translated as "Title 26" thus requiring no change in text.

1976 Amendment. Subsec. (a). Pub.L. 94-482 in par. (6) substituted "this" for "This", and added pars. (7) to (9).

1974 Amendment. Subsec. (a). Pub.L. 93-568 added par. (6).

Effective Dates

1976 Act. Section 412(b) of Pub.L. 94-482 provided that: "The amendment made by subsection (a) [to this section] shall take effect upon the date of enactment of this Act [Oct. 12, 1976]."

1974 Act. Section 3(b) of Pub.L. 93-568 provided that: "The provisions of the amendment made by subsection (a) [amending this section] shall be effective on, and retroactive to, July 1, 1972."

Transfer of Functions

"Secretary" was substituted for "Commissioner" in subsec. (a)(2) pursuant to sections 301(a)(1) and 507 of Pub. L. 96-88, which are classified to sections 3441(a)(1) and 3507 of this title and which transferred all functions of the Commissioner of Education to the Secretary of Education.

Short Title

1988 Amendment Pub.L. 100-259, § 1, Mar. 22, 1988, 102 Stat. 28, provided that: "This Act [enacting sections 1687 and 1688 of this title and section 2000d-4a of Title 42, The Public Health and Welfare, amending sections 706 and 794 of Title 29, Labor, and section 6107 of Title 42, and enacting provisions set out as notes under sections 1687 and 1688 of this title] may be cited as the 'Civil Rights Restoration Act of 1987'."

Construction

Enactment of sections 1687 and 1688 of this title by Pub.L. 100-259 not to be construed to extend the application of title IX of the Education Amendments of 1972 [Pub.L. 92-318] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see

Pub.L. 100-259, § 7, Mar. 22, 1988, 102 Stat. 31, set out as a note under section 1687 of this title.

Coordination of Implementation and Enforcement of Provisions

For provisions relating to the coordination of implementation and enforcement of the provisions of this chapter by the Attorney General, see section 1-201(b) of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

Regulations; Nature of Particular Sports: Intercollegiate Athletic Activities

Pub.L. 93-380, Title VIII, § 844, Aug. 21, 1974, 88 Stat. 612, provided that the Secretary prepare and publish, not more than 30 days after Aug. 21, 1974, proposed regulations implementing the provisions of this chapter regarding prohibition of sex discrimination in federally assisted programs, including reasonable regulations for intercollegiate athletic activities considering the nature of the particular sports.

20 USCA § 1682. Federal Administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination, or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* That no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action

terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

CREDIT(S)

1990 Main Volume

(Pub. L. 92-318, Title IX, § 902, June 23, 1972, 86 Stat. 374.)

HISTORICAL NOTES – HISTORICAL AND STATUTORY NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1972 Act. House Report No. 92-554, Senate Report No. 92-604, and Senate Conference Report No. 92-798, see 1972 U.S.Code Cong. and Adm.News, p. 2462.

Delegation of Functions

Functions of the President relating to approval of rules, regulations, and orders of general applicability under this section, were delegated to the Attorney General, see section 1-102 of Ex. Ord. No. 12250, Nov. 2, 1980, 45 F.R. 72995, set out as a note under section 2000d-1 of Title 42, The Public Health and Welfare.

Construction

Enactment of sections 1687 and 1688 of this title by Pub.L. 100-259 not to be construed to extend the application of title IX of the Education Amendments of 1972 [Pub.L. 92-318] to ultimate beneficiaries of Federal financial assistance excluded from coverage before Mar. 22, 1988, see Pub.L. 100-259, § 7, Mar. 22, 1988, 102 Stat. 31, set out as a note under section 1687 of this title.

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20 U.S.C.A. § 1687

Interpretation of "program or activity"

For the purposes of this chapter, the term[1] "program or activity" and "program" mean all of the operations of –

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

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[1] So in original. Probably should be plural.

(B) a local educational agency (as defined in section 8801 of this title), system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

CREDIT(S)

1990 Main Volume

(Pub.L. 92-318, Title IX, § 908, as added Pub.L. 100-259, § 3(a), Mar. 22, 1988, 102 Stat. 28.)

1998 Electronic Update

(As amended Pub.L. 103-382, Title III, § 391 (g), Oct. 20, 1994, 108 Stat. 4023.)

HISTORICAL NOTES – HISTORICAL AND STATUTORY NOTES

HISTORICAL AND STATUTORY NOTES

Revision Notes and Legislative Reports

1988 Act. Senate Report No. 100-64, see 1988 U.S.Code Cong. and Adm.News, p. 3

1994 Acts. House Report No. 103-425 and House Conference Report No. 103-761, see 1994 U.S. Code Cong. and Adm. News, p. 2807.

References in Text

This chapter, referred to in provision preceding par. (1), was in the original "this title", meaning title IX of Pub.L. 92-318 which enacted this chapter and amended sections 203 and 213 of Title 29, Labor, and sections 2000c, 2000c-6, 2000c-9, and 2000h-2 of Title 42, The Public Health and Welfare. For complete classification of title IX to the Code, see Tables.

Amendments

1994 Amendments. Par. (2)(B). Pub.L. 103-382, § 391 (g), substituted "section 8801 of this title" for "section 2854(a)(10) of this title".

Abortion Neutrality

This section not to be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal funds to perform or pay for an abortion, see section 8 of Pub.L. 100-259, set out as a note under section 1688 of this title.

Construction

Section 7 of Pub.L. 100-259 provided that: "Nothing in the amendments made by this Act [enacting this section, section 1688 of this title, and section 2000d-4a of Title 42, The Public Health and Welfare, amending sections 706 and 794 of Title 29, Labor, and section 6107 of Title 42, and enacting provisions set out as notes under section 1681 and 1688 of this title] shall be construed to extend the application of the Acts so amended [Education Amendments of 1972 [Pub.L. 92-318, see Short Title of 1972 Amendment, set out as a note under section 1001 of this title, Rehabilitation Act of 1973, section 701 et seq. of Title 29, Age Discrimination Act of 1975, section 6101 et seq. of Title 42, and Civil Rights Act of 1964, section 2000a et seq. of Title 42] to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act [Mar. 22, 1988]."

Findings of Congress

Section 2 of Pub.L. 100-259 provided that:

"The Congress finds that –

"(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast

doubt upon the broad application of title IX of the Education Amendments of 1972 [this chapter], section 504 of the Rehabilitation Act of 1973 [section 794 of Title 29, Labor], the Age Discrimination Act of 1975 [section 6101 et seq. of Title 42, The Public Health and Welfare], and title VI of the Civil Rights Act of 1964 [section 2000d et seq. of Title 42]; and

"(2) legislative action is necessary to restore the prior consistent and longstanding executive branch interpretation and broad, institution-wide application of those laws as previously administered."

CODE OF FEDERAL REGULATIONS
TITLE 34 – EDUCATION
SUBTITLE B – REGULATIONS OF THE OFFICES OF THE DEPARTMENT OF EDUCATION
CHAPTER I – OFFICE FOR CIVIL RIGHTS, DEPARTMENT OF EDUCATION
PART 106 – NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS AND ACTIVITIES RECEIVING OR BENEFITING FROM FEDERAL FINANCIAL ASSISTANCE
SUBPART A – INTRODUCTION

Current through May 22, 1998; 63 FR 28453

Source: 45 FR 30955, May 9, 1980, unless otherwise noted.

34 C.F.R. Part 106

§ 106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub.L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub.L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682, as amended by Pub.L. 93-568, 88 Stat. 1855, and Sec. 844, Education Amendments of 1974, 88 Stat. 484, Pub.L. 93-380)

§ 106.2 Definitions.

As used in this part, the term:

(a) "Title IX" means title IX of the Education Amendments of 1972, Pub.L. 92-318, as amended by section 3 of Pub.L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) "Department" means the Department of Education.

(c) "Secretary" means the Secretary of Education.

(d) "Assistant Secretary" means the Assistant Secretary for Civil Rights of the Department.

(e) "Reviewing Authority" means that component of the Department delegated authority by the Secretary to appoint, and to review the decisions of, administrative law judges in cases arising under this part.

(f) "Administrative law judge" means a person appointed by the reviewing authority to preside over a hearing held under this part.

(g) "Federal financial assistance" means any of the following, when authorized or extended under a law administered by the Department:

(1) A grant or loan of Federal financial assistance, including funds made available for:

(i) The acquisition, construction, renovation, restoration, or repair of a building or facility or any portion thereof; and

(ii) Scholarships, loans, grants, wages or other funds extended to any entity for payment to or on behalf

of students admitted to that entity, or extended directly to such students for payment to that entity.

(2) A grant of Federal real or personal property or any interest therein, including surplus property, and the proceeds of the sale or transfer of such property, if the Federal share of the fair market value of the property is not, upon such sale or transfer, properly accounted for to the Federal Government.

(3) Provision of the services of Federal personnel.

(4) Sale or lease of Federal property or any interest therein at nominal consideration, or at consideration reduced for the purpose of assisting the recipient or in recognition of public interest to be served thereby, or permission to use Federal property or any interest therein without consideration.

(5) Any other contract, agreement, or arrangement which has as one of its purposes the provision of assistance to any education program or activity, except a contract of insurance or guaranty.

(h) "Recipient" means any State or political subdivision thereof, or any instrumentality of a State or political subdivision thereof, any public or private agency, institution, or organization, or other entity, or any person, to whom Federal financial assistance is extended directly or through another recipient and which operates an education program or activity which receives or benefits from such assistance, including any subunit, successor, assignee, or transferee thereof.

(i) "Applicant" means one who submits an application, request, or plan required to be approved by a

Department official, or by a recipient, as a condition to becoming a recipient.

(j) "Educational institution" means a local educational agency (LEA) as defined by section 1001(f) of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 3381), a preschool, a private elementary or secondary school, or an applicant or recipient of the type defined by paragraph (k), (l), (m), or (n) of this section.

(k) "Institution of graduate higher education" means an institution which:

(1) Offers academic study beyond the bachelor of arts or bachelor of science degree, whether or not leading to a certificate of any higher degree in the liberal arts and sciences; or

(2) Awards any degree in a professional field beyond the first professional degree (regardless of whether the first professional degree in such field is awarded by an institution of undergraduate higher education or professional education); or

(3) Awards no degree and offers no further academic study, but operates ordinarily for the purpose of facilitating research by persons who have received the highest graduate degree in any field of study.

(l) "Institution of undergraduate higher education" means:

(1) An institution offering at least two but less than four years of college level study beyond the high school level, leading to a diploma or an associate degree, or wholly or principally creditable toward a baccalaureate degree; or

(2) An institution offering academic study leading to a baccalaureate degree; or

(3) An agency or body which certifies credentials or offers degrees, but which may or may not offer academic study.

(m) "Institution of professional education" means an institution (except any institution of undergraduate higher education) which offers a program of academic study that leads to a first professional degree in a field for which there is a national specialized accrediting agency recognized by the Secretary.

(n) "Institution of vocational education" means a school or institution (except an institution of professional or graduate or undergraduate higher education) which has as its primary purpose preparation of students to pursue a technical, skilled, or semiskilled occupation or trade, or to pursue study in a technical field, whether or not the school or institution offers certificates, diplomas, or degrees and whether or not it offers fulltime study.

(o) "Administratively separate unit" means a school, department or college of an educational institution (other than a local educational agency) admission to which is independent of admission to any other component of such institution.

(p) "Admission" means selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at an education program or activity operated by a recipient.

(q) "Student" means a person who has gained admission.

(r) "Transition plan" means a plan subject to the approval of the Secretary pursuant to section 901(a)(2) of the Education Amendments of 1972, under which an educational institution operates in making the transition from being an educational institution which admits only students of one sex to being one which admits students of both sexes without discrimination.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[45 FR 30955, May 9, 1980; 45 FR 37426, June 3, 1980]

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§ 106.31 Education programs and activities.

(a) General. Except as provided elsewhere in this part, no person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives or benefits from Federal financial assistance. This subpart does not apply to actions of a recipient in connection with admission of its students to an education program or activity of (1) a recipient to which Subpart C does not apply, or (2) an entity, not a recipient, to which Subpart C would not apply if the entity were a recipient.

(b) Specific prohibitions. Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:

(1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

(5) Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

(6) Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;

(7) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

(c) Assistance administered by a recipient educational institution to study at a foreign institution. A recipient educational institution may administer or assist in the administration of scholarships, fellowships, or other awards established by foreign or domestic wills, trusts, or similar legal instruments, or by acts of foreign governments and restricted to members of one sex, which are designed to provide opportunities to study abroad, and which are awarded to students who are already matriculating at or who are graduates of the recipient institution; Provided, a recipient educational institution which administers or assists in the administration of such

scholarships, fellowships, or other awards which are restricted to members of one sex provides, or otherwise makes available reasonable opportunities for similar studies for members of the other sex. Such opportunities may be derived from either domestic or foreign sources.

(d) Programs not operated by recipient.

(1) This paragraph applies to any recipient which requires participation by any applicant, student, or employee in any education program or activity not operated wholly by such recipient, or which facilitates, permits, or considers such participation as part of or equivalent to an education program or activity operated by such recipient, including participation in educational consortia and cooperative employment and student-teaching assignments.

(2) Such recipient;

(i) Shall develop and implement a procedure designed to assure itself that the operator or sponsor of such other education program or activity takes no action affecting any applicant, student, or employee of such recipient which this part would prohibit such recipient from taking; and

(ii) Shall not facilitate, require, permit, or consider such participation if such action occurs.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

CREDIT

[45 FR 30955, May 9, 1980, as amended at 47 FR 32527, July 28, 1982]

§ 106.32 Housing.

(a) Generally. A recipient shall not, on the basis of sex, apply different rules or regulations, impose different fees or requirements, or offer different services or benefits related to housing, except as provided in this section (including housing provided only to married students).

(b) Housing provided by recipient.

(1) A recipient may provide separate housing on the basis of sex.

(2) Housing provided by a recipient to students of one sex, when compared to that provided to students of the other sex, shall be as a whole:

(i) Proportionate in quantity to the number of students of that sex applying for such housing; and

(ii) Comparable in quality and cost to the student.

(c) Other housing.

(1) A recipient shall not, on the basis of sex, administer different policies or practices concerning occupancy by its students of housing other than provided by such recipient.

(2) A recipient which, through solicitation, listing, approval of housing, or otherwise, assists any agency, organization, or person in making housing available to any of its students, shall take such reasonable action as may be necessary to assure itself that such housing as is provided to students of one sex, when compared to that provided to students of the other sex, is as a whole:

(i) Proportionate in quantity and (ii) comparable in quality and cost to the student. A recipient may render such assistance to any agency, organization, or person which provides all or part of such housing to students only of one sex.

(Authority: Secs. 901, 902, 907, Education Amendments of 1972, 86 Stat. 373, 374, 375; 20 U.S.C. 1681, 1682, 1686)

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§ 106.33 Comparable facilities.

A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374)

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§ 106.34 Access to course offerings.

A recipient shall not provide any course or otherwise carry out any of its education program or activity separately on the basis of sex, or require or refuse participation therein by any of its students on such basis, including health, physical education, industrial, business,

vocational, technical, home economics, music, and adult education courses.

(a) With respect to classes and activities in physical education at the elementary school level, the recipient shall comply fully with this section as expeditiously as possible but in no event later than one year from the effective date of this regulation. With respect to physical education classes and activities at the secondary and post-secondary levels, the recipient shall comply fully with this section as expeditiously as possible but in no event later than three years from the effective date of this regulation.

(b) This section does not prohibit grouping of students in physical education classes and activities by ability as assessed by objective standards of individual performance developed and applied without regard to sex.

(c) This section does not prohibit separation of students by sex within physical education classes or activities during participation in wrestling, boxing, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(d) Where use of a single standard of measuring skill or progress in a physical education class has an adverse effect on members of one sex, the recipient shall use appropriate standards which do not have such effect.

(e) Portions of classes in elementary and secondary schools which deal exclusively with human sexuality may be conducted in separate sessions for boys and girls.

(f) Recipients may make requirements based on vocal range or quality which may result in a chorus or choruses of one or predominantly one sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.35 Access to schools operated by LEAs.

A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

(a) Any institution of vocational education operated by such recipient; or

(b) Any other school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.36 Counseling and use of appraisal and counseling materials.

(a) Counseling. A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

(b) Use of appraisal and counseling materials. A recipient which uses testing or other materials for appraising or counseling students shall not use different materials for students on the basis of their sex or use materials which permit or require different treatment of students on such basis unless such different materials cover the same occupations and interest areas and the use of such different materials is shown to be essential to eliminate sex bias. Recipients shall develop and use internal procedures for ensuring that such materials do not discriminate on the basis of sex. Where the use of a counseling test or other instrument results in the substantially disproportionate number of members of one sex in any particular course of study or classification, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination in the instrument or its application.

(c) Disproportion in classes. Where a recipient finds that a particular class contains a substantially disproportionate number of individuals of one sex, the recipient shall take such action as is necessary to assure itself that such disproportion is not the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.37 Financia[1] assistance.

(a) General. Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limited eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate; (2) through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or (3) apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

(b) Financial aid established by certain legal instruments.

(1) A recipient may administer or assist in the administration of scholarships, fellowships, or other forms of financial assistance established pursuant to domestic or foreign wills, trusts, bequests, or similar legal instruments or by acts of a foreign government which requires that awards be made to members of a particular sex specified therein; Provided, That the overall effect of the award of such sex-restricted scholarships, fellowships, and other forms of financial assistance does not discriminate on the basis of sex.

(2) To ensure nondiscriminatory awards of assistance as required in paragraph (b)(1) of this section, recipients shall develop and use procedures under which:

(i) Students are selected for award of financial assistance on the basis of nondiscriminatory criteria and not on the basis of availability of funds restricted to members of a particular sex;

(ii) An appropriate sex-restricted scholarship, fellowship, or other form of financial assistance is allocated to each student selected under paragraph (b)(2)(i) of this section; and

(iii) No student is denied the award for which he or she was selected under paragraph (b)(2)(i) of this section because of the absence of a scholarship, fellowship, or other form of financial assistance designated for a member of that student's sex.

(c) Athletic scholarships.

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; and Sec. 844, Education Amendments of 1974, Pub.L. 93-380, 88 Stat. 484)

§ 106.38 Employment assistance to students.

(a) Assistance by recipient in making available outside employment. A recipient which assists any agency, organization or person in making employment available to any of its students:

(1) Shall assure itself that such employment is made available without discrimination on the basis of sex; and

(2) Shall not render such services to any agency, organization, or person which discriminates on the basis of sex in its employment practices.

(b) Employment of students by recipients. A recipient which employs any of its students shall not do so in a manner which violates Subpart E of this part.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.39 Health and insurance benefits and services.

In providing a medical, hospital, accident, or life insurance benefit, service, policy, or plan to any of its students, a recipient shall not discriminate on the basis of sex, or provide such benefit, service, policy, or plan in a manner which would violate Subpart E of this part if it were provided to employees of the recipient. This section shall not prohibit a recipient from providing any benefit or service which may be used by a different proportion of students of one sex than of the other, including family

planning services. However, any recipient which provides full coverage health service shall provide gynecological care.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.40 Martial or parental status.

(a) Status generally. A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

(b) Pregnancy and related conditions.

(1) A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.

(2) A recipient may require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.

(3) A recipient which operates a portion of its education program or activity separately for pregnant students, admittance to which is completely voluntary on the part of the student as provided in paragraph (b)(1) of this section shall ensure that the instructional program in the separate program is comparable to that offered to non-pregnant students.

(4) A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.

(5) In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

§ 106.41 Athletics.

(a) General. No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.

(b) Separate teams. Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(c) Equal opportunity. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(d) Adjustment period. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the elementary school level shall comply fully with this section as expeditiously as possible but

in no even later than one year from the effective date of this regulation. A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics at the secondary or post- secondary school level shall comply fully with this section as expeditiously as possibly but in no event later than three years from the effective date of this regulation.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682; Sec. 844, Education Amendments of 1974, Pub.L. 93-380, 88 Stat. 484)

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§ 106.42 Textbooks and curricular material.

Nothing in this regulation shall be interpreted as requiring or prohibiting or abridging in any way the use of particular textbooks or curricular materials.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.51 Employment.

(a) General.

(1) No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-

time or part-time, under any education program or activity operated by a recipient which receives or benefits from Federal financial assistance.

(2) A recipient shall make all employment decisions in any education program or activity operated by such recipient in a nondiscriminatory manner and shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

(3) A recipient shall not enter into any contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination prohibited by this subpart, including relationships with employment and referral agencies, with labor unions, and with organizations providing or administering fringe benefits to employees of the recipient.

(4) A recipient shall not grant preferences to applicants for employment on the basis of attendance at any educational institution or entity which admits as students only or predominantly members of one sex, if the giving of such preferences has the effect of discriminating on the basis of sex in violation of this part.

(b) Application. The provisions of this subpart apply to:

(1) Recruitment, advertising, and the process of application for employment;

(2) Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;

(3) Rates of pay or any other form of compensation, and changes in compensation;

(4) Job assignments, classifications and structure, including position descriptions, lines of progression, and seniority lists;

(5) The terms of any collective bargaining agreement;

(6) Granting and return from leaves of absence, leave for pregnancy, childbirth, false pregnancy, termination of pregnancy, leave for persons of either sex to care for children or dependents, or any other leave;

(7) Fringe benefits available by virtue of employment, whether or not administered by the recipient;

(8) Selection and financial support for training, including apprenticeship, professional meetings, conferences, and other related activities, selection for tuition assistance, selection for sabbaticals and leaves of absence to pursue training;

(9) Employer-sponsored activities, including social or recreational programs; and

(10) Any other term, condition, or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.52 Employment criteria.

A recipient shall not administer or operate any test or other criterion for any employment opportunity which has a disproportionately adverse effect on persons on the basis of sex unless:

(a) Use of such test or other criterion is shown to predict validly successful performance in the position in question; and

(b) Alternative tests or criteria for such purpose, which do not have such disproportionately adverse effect, are shown to be unavailable.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.53 Recruitment

(a) Nondiscriminatory recruitment and hiring. A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees. Where a recipient has been found to be presently discriminating on the basis of sex in the recruitment or hiring of employees, or has been found to have in the past so discriminated, the recipient shall recruit members of the sex so discriminated against so as to overcome the effects of such past or present discrimination.

(b) Recruitment patterns. A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex in violation of this subpart.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.54 Compensation

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.55 Job classification and structure.

A recipient shall not:

(a) Classify a job as being for males or for females;

(b) Maintain or establish separate lines of progression, seniority lists, career ladders, or tenure systems based on sex; or

(c) Maintain or establish separate lines of progression, seniority systems, career ladders, or tenure systems for similar jobs, position descriptions, or job requirements

which classify persons on the basis of sex, unless sex is a bona-fide occupational qualification for the positions in question as set forth in § 106.61.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.56 Fringe benefits.

(a) "Fringe benefits" defined. For purposes of this part, "fringe benefits" means: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of § 106.54.

(b) Prohibitions. A recipient shall not:

(1) Discriminate on the basis of sex with regard to making fringe benefits available to employees or make fringe benefits available to spouses, families, or dependents of employees differently upon the basis of the employee's sex;

(2) Administer, operate, offer, or participate in a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or

(3) Administer, operate, offer, or participate in a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex or which otherwise discriminates in benefits on the basis of sex.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

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§ 106.57 Marital or parental status.

(a) General. A recipient shall not apply any policy or take any employment action:

(1) Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or

(2) Which is based upon whether an employee or application for employment is the head of household or principal wage earner in such employee's or applicant's family unit.

(b) Pregnancy. A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

(c) Pregnancy as a temporary disability. A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.

(d) Pregnancy leave. In the case of a recipient which does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status which she held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.

(Authority: Secs. 901, 902, Education Amendments of 1972, 86 Stat. 373, 374; 20 U.S.C. 1681, 1682)

[102 STAT. 28]

PUBLIC LAW 100-259 [S. 557]; March 22, 1988

CIVIL RIGHTS RESTORATION ACT OF 1987

For Legislative History of Act, see p. 3.

An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as the "Civil Rights Restoration Act of 1987".

FINDINGS OF CONGRESS

SEC. 2. The Congress finds that –

(1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and

(2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.

EDUCATION AMENDMENTS AMENDMENT

SEC. 3. (a) Title IX of the Education Amendments of 1972 is amended by adding at the end the following new sections:

"INTERPRETATION OF 'PROGRAM OR ACTIVITY'

"SEC. 908. For the purposes of this title, the term 'program or activity' and 'program' mean all of the operations of –

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

[102 STAT. 29] "(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 901 to such operation would not be consistent with the religious tenets of such organization".

(b) Notwithstanding any provision of this Act or any amendment adopted thereto:

"NEUTRALITY WITH RESPECT TO ABORTION

"SEC. 909. Nothing in this title shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion".

REHABILITATION ACT AMENDMENT

SEC. 4. Section 504 of the Rehabilitation Act of 1973 is amended –

(1) by inserting "(a)" after "SEC. 504."; and

(2) by adding at the end the following new subsections:

"(b) For the purposes of this section, the term 'program or activity' means all of the operations of –

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation partnership, or other private organization, or an entire sole proprietorship –

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care,

housing, social services, or parks and recreation; or

[102 STAT. 30] "(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.

"(c) Small providers are not required by subsection (a) to make significant structural alterations to their existing facilities for the purpose of assuring program accessibility, if alternative means of providing the services are available. The terms used in this subsection shall be construed with reference to the regulations existing on the date of the enactment of this subsection".

AGE DISCRIMINATION ACT AMENDMENT

SEC. 5. Section 309 of the Age Discrimination Act of 1975 is amended –

(1) by striking out "and" at the end of paragraph (2);

(2) by striking out the period at the end of paragraph (3) and inserting "; and" in lieu thereof; and

(3) by inserting after paragraph (3) the following new paragraph:

(4) the term 'program or activity' means all of the operations of –

"(A)(i) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(ii) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(B)(i) a college, university, or other postsecondary institution, or a public system of higher education; or

"(ii) a local educational agency (as defined in section 198(a)(10), of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(C)(i) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

"(I) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(II) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

"(ii) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(D) any other entity which is established by two or more of the entities described in subparagraph (A), (B), or (C);

any part of which is extended Federal Financial assistance".

[102 STAT. 31] CIVIL RIGHTS ACT AMENDMENT

SEC. 6. Title VI of the Civil Rights Act of 1964 is amended by adding at the end the following new section:

"SEC. 606. For the purposes of this title, the term 'program or activity' and the term 'program' mean all the operations of –

"(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

"(B) the entity of such State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

"(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

"(B) a local educational agency (as defined in section 198(a)(10) of the Elementary and Secondary Education Act of 1965), system of vocational education, or other school system;

"(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship –

"(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

"(ii) which is principally engaged in the business of providing education, health care,

housing, social services, or parks and recreation; or

"(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

"(4) any other entity which is established by two or more of the entities described in paragraph (1), (2), or (3);

any part of which is extended Federal financial assistance.".

RULE OF CONSTRUCTION

SEC. 7. Nothing in the amendments made by this Act shall be construed to extend the application of the Acts so amended to ultimate beneficiaries of Federal financial assistance excluded from coverage before the enactment of this Act.

ABORTION NEUTRALITY

SEC. 8. No provision of this Act or any amendment made by this Act shall be construed to force or require any individual or hospital or any other institution, program, or activity receiving Federal Funds to perform or pay for an abortion.

CLARIFICATION OF INDIVIDUALS WITH HANDICAPS IN THE EMPLOYMENT CONTEXT

SEC. 9. Section 7(8) of the Rehabilitation Act of 1973 is amended by adding after subparagraph (B) the following:

"(C) For the purpose of sections 503 and 504, as such sections relate to employment, such term does not include an individual who [102 STAT. 32] has a currently contagious disease or infection and who, by reason of such disease or infection, would constitute a direct threat to the health or safety of other individuals or who, by reason of the currently contagious disease or infection, is unable to perform the duties of the job".

JIM WRIGHT
Speaker of the House of Representatives.

HARRY M. REID
Acting President of the Senate pro tempore.

IN THE SENATE OF THE UNITED STATES,

March 22 (legislative day, March 21), 1988.

The Senate having proceeded to reconsider the bill (S. 557) entitled "An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964", returned by the President of the United States with his objections, to the Senate, in which it originated, it was

Resolved, That the said bill pass, two-thirds of the Senators present having voted in the affirmative.

Attest:

WALTER J. STEWART
Secretary.

I certify that this Act originated in the Senate.

WALTER J. STEWART
Secretary.

IN THE HOUSE OF REPRESENTATIVES, U.S.,

March 22, 1988.

The House of Representatives having proceeded to reconsider the bill (S. 557) entitled "An Act to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964", returned by the President of the United States with his objections, to the Senate, in which it originated, and passed by the Senate on reconsideration of the same, it was

Resolved. That the said bill pass, two-thirds of the House of Representatives agreeing to pass the same.

Attest:

DONNALD K. ANDERSON
Clerk.

LEGISLATIVE HISTORY – S. 557:

SENATE REPORTS: No. 100-64 (Comm. on Labor and Human Resources).
CONGRESSIONAL RECORD, Vol. 134 (1988):
Jan. 26-28, considered and passed Senate.
Mar. 2, considered and passed House.
WEEKLY COMPILATION OF PRESIDENTIAL DOCUMENTS, Vol. 24 (1988):
Mar. 16, Presidential veto messages.
CONGRESSIONAL RECORD, Vol. 134 (1988):
Mar. 22, Senate and House overrode veto.

CIVIL RIGHTS RESTORATION ACT OF 1987

P.L. 100-259, see page 102 Stat. 28

DATES OF CONSIDERATION AND PASSAGE

House: March 2, 1988

Senate: January 28, 1988

Senate Report (Labor and Human Resources Committee) No. 100-64, June 5, 1987 [To accompany S. 557]

Cong. Record Vol. 134 (1988)

No House Report was submitted with this legislation.

SENATE REPORT NO. 100-64

[page 1]

The Committee on Labor and Human Resources, to which was referred the bill (S. 557), to restore the broad scope of coverage and to clarify the application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964, having considered the same, reports favorably thereon with an amendment in the nature of a substitute, and recommends that the bill as amended do pass.

I. INTRODUCTION

On May 20, 1987, the Committee on Labor and Human Resources, by a vote of 12-4, ordered favorably reported S. 557, "The Civil Rights Restoration Act of 1987." Senators voting in favor of the bill were Senators Kennedy, Pell, Metzenbaum, Matsunaga, Dodd, Simon, Harkin, Adams, Mikulski, Stafford, Weicker, and

Cochran. Voting against were Senators Hatch, Quayle, Thurmond, and Humphrey.

The bill is sponsored by Senator Edward M. Kennedy, Chairman of the Committee, and cosponsored by Senators Weicker, Metzenbaum, Packwood, Cranston, Stafford, Adams, Baucus, Bentsen, Biden, Bingaman, Bradley, Breaux, Burdick, Chafee, Chiles, Cohen, Daschle, DeConcini, Dodd, Ford, Fowler, Glenn, Gore, Harkin, Hol-

[page 2]

lings, Inouye, Johnston, Kerry, Lautenberg, Leahy, Levin, Matsunaga, Melcher, Mikulski, Mitchell, Moynihan, Pell, Proxmire, Riegle, Rockefeller, Sanford, Sarbanes, Simon, Specter, Stevens, Wirth, Dixon, Rudman, Durenberger, Evans, Boschwitz, Heinz, Sasser, Graham, Nunn, Bumpers and Pryor.

II. Purpose

S. 557 was introduced on February 19, 1987, to overturn the Supreme Court's 1984 decision in *Grove City College* v. *Bell*, 465 U.S. 555,[1] and to restore the effectiveness and vitality of the four major civil rights statutes that prohibit discrimination in federally assisted programs.

The *Grove City* ruling severely narrows the application of coverage of Title IX of the Education Amendments of 1972, Title VI of the Civil Rights Act of 1964, Section

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[1] 104 S.Ct. 1211, 79 L.Ed.2d 516.

504 of the Rehabilitation Act of 1973, and the Age Discrimination Act of 1975.

The purpose of the Civil Rights Restoration Act of 1987 is to reaffirm pre-*Grove City College* judicial and executive branch interpretations and enforcement practices which provided for broad coverage of the anti-discrimination provisions of these civil rights statutes.

III. Background

In 1963, when President John F. Kennedy transmitted the Civil Rights Act to Congress, he stated:

> Simple justice requires that public funds, to which all taxpayers of all races contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial discrimination. direct discrimination by Federal, state or local governments is prohibited by the Constitution. But indirect discrimination, through the use of Federal funds, is just as invidious, . . .

The legislation responded to increasing minority protest over continuing racial discrimination in schools, voting, public accommodations and housing discrimination that had persisted in many instances in the face of court decisions declaring the practices unconstitutional. Title VI bars discrimination based on race, color or national origin in a "program or activity" that receives Federal aid, and was part of the most far-reaching civil rights legislation since the Reconstruction Era.

Title VI became a major vehicle for attacking the separate and unequal society which denied basic opportunities to millions of Americans. Recognizing that other groups also suffered the effects of discrimination, Congress enacted legislation protecting the civil rights of women, disabled persons and older Americans.

Title IX of the Education Amendments of 1972 prohibits sex discrimination in educational programs or activities receiving Federal financial assistance. Title IX has broken down a variety of sex barriers in education, including participation in athletics and graduate degree programs.

Section 504 of the Rehabilitation Act of 1973 prohibits recipients of Federal funding from discriminating against disabled persons.

[page 3]

Since this law was passed, opportunities for disabled persons have increased in education, employment, housing, transportation and health social services.

The Age Discrimination Act of 1975 prohibits discrimination on the basis of age in the delivery of services and benefits supported by Federal funds. This act has helped increase public awareness of the barriers to full opportunity that continue to exist for millions of Americans.

Each of the statutes employs the same careful language to describe coverage so that the same standards are used to interpret and enforce all four laws. Therefore, on February 28, 1984, when the Supreme Court decided the

Title IX case, *Grove City* v. *Bell*, all four statutes were affected.

The Court unanimously held that the student aid dollars reaching the college through its students constituted federal financial assistance to the school. However, in determining the scope of the duty not to discriminate, a divided court interpreted the law's "program or activity" phrase narrowly. Because the only Federal money reaching the college was in the form of student aid the Court concluded that only the financial aid office was covered by Title IX. The rest of the college was left free to deny equal opportunities to women (and by analogy to minorities, disabled and older persons as well). The *Grove City* ruling reversed years of administrative interpretation and enforcement practice by Republican and Democratic administrations and was in conflict with many court interpretations of the laws. On the same day, the Supreme Court ruled in an employment case arising under Section 504 that the phrase "program or activity" was as narrow under that law as under Title IX. *Consolidated Rail Corporation* v. *Darrone*, 465 U.S. 624, 104 S. Ct. 1248[2] (1984).

In response to the *Grove City College* decision, Senators Kennedy and Packwood introduced S. 2568, the "Civil Rights Act of 1984" on April 12, 1984. The bill had 63 cosponsors in the Senate. Hearings were held in the Labor and Human Resources Committee on May 24, 1984 and June 26, 1984.

The bill would have deleted the words "program or activity" from Title IV, Title VI, section 504, and the Age

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[2] 79 L.Ed.2d 568.

Discrimination Act, and substituted the word "recipient." An identical bill passed the House of Representatives by a vote of 375 to 32 on June 26, 1984.

The bill was not reported by the Labor and Human Resources Committee. It was offered as a floor amendment to the continuing resolution and was tabled in the closing days of the 98th Congress after a filibuster which continued even after the invocation of cloture.

In the 99th Congress, S. 431, the "Civil Rights Restoration Act of 1985" was introduced on February 7, 1985 with 47 cosponsors. Hearings were held in the Labor and Human Resources Committee on July 17, 1985 and September 20, 1985. The bill was not reported by the Labor and Human Resources Committee.

In this Congress, S. 557, the "Civil Rights Restoration Act of 1987" was introduced on February 19, 1987, with 56 cosponsors. As of the filing of this report, there are 58 cosponsors. Hearings were held by the Labor and Human Resources Committee on March 19

[page 4]

and April 1. The bill was ordered reported on May 20, by a vote of 12-4.

IV. Summary of the Bill

S. 557 will restore Title IX, Section 504, the Age Discrimination Act and Title VI to the broad, institute-wide application which characterized coverage and enforcement from the time of initial passage until the *Grove City* decision. It adds no new language to the coverage or fund termination provisions of Title VI, Title

IX, section 504, and the Age Discrimination Act. The Civil Rights Restoration Act of 1987 amends each of the affected statutes by adding a section defining the phrase "program or activity" and "program" to make clear that discrimination is prohibited throughout entire agencies or institutions if any part receives Federal financial assistance. This approach is very different from that taken in the bill considered in the 98th Congress. That bill deleted the term "program or activity" and instead defined "recipient" of federal financial assistance. The change in S. 557 was made in the interest of greater clarity.

For education institutions, the bill provides that where federal aid is extended anywhere within a college, university, or public system of higher education, the entire institution or system is covered. If federal aid is extended anywhere in an elementary or secondary school system, the entire system is covered.

For State and local governments, only the department or agency which receives the aid is covered. Where an entity of state or local government receives federal aid and distribute it to another department or agency, both entities are covered.

For private corporations, if the federal aid is extended to the corporation as a whole, or if the corporation provides a public service, such as social services, education, or housing the entire corporation is covered. If the federal aid is extended to only one plant or geographically separate facility, only that plant is covered.

For other entities established by two or more of the above-described entities, the entire entity is covered if it receives any federal aid.

The bill contains a rule of construction which leaves intact the current exemption from coverage by the civil rights laws for "ultimate beneficiaries" of federal financial assistance. The bill also incorporates regulatory "small providers" exceptions into the coverage provisions of section 504 and clarifies that the religious tenet exemption in Title IX extends to any activity of an entity controlled by a religious organization which would otherwise be covered by Title IX. It does not otherwise change the current nature of the religious tenet exemption.

V. Need for Legislation

Pre-Grove City coverage of the four statutes was institution-wide

The legislative history of the statutes in question shows Congress intended institution-wide coverage.

[page 5]

In enacting the four civil rights statutes, Congress intended that each be broadly interpreted to provide effective remedies against discrimination. The debates emphasized both the anticipated breadth of coverage as well as the important and fundamental aims these statutes would achieve. This was clear not only in connection with Title VI, but also with the other civil rights statutes which were modeled on Title VI with respect to both language and intended effect. Contrary to the view of the Supreme Court that the language common to these statutes (i.e., "program or activity") should be given a limited interpretation, Congress intended institution wide

coverage and the executive branch has historically insisted upon this view. It was understood at the outset that the task of eliminating discrimination from institutions which receive federal financial assistance could only be accomplished if the civil rights statutes were given the broadest interpretation.

A. Title VI

When Congress enacted Title VI, it emphasized the breadth of its coverage. For example, Senator Hubert Humphrey stated that "the purpose of Title VI is to make sure the funds of the United States are not used to support racial discrimination" 110 Cong. Rec. 6544 (1964). Indeed, both proponents and opponents agreed that the prohibition of discrimination would be a broad one. See 110 Cong. Rec. 6544 (broad power to eliminate discrimination conferred) (remarks of Senator Humphrey); Id at 13322. (" . . . title VI sufficiently broad . . . for issuance of open housing order affecting the entire United States") (remarks of Senator Gore); Id at 13378 (broad power delegated to eliminate discrimination) (remarks of Senator McClellan.)

That Congress intended a broadly applicable prohibition of discrimination is underscored by the narrow funding termination provision included in each of the statutes. During the Title VI debate, great emphasis was given to the distinction between Section 601 of Title VI which bans discrimination, and Section 602 which provides for termination of federal aid. Many feared that the passage of Title VI would lead to immediate termination of federal aid to many institutions and states which engaged in

open racial discrimination. Senator Humphrey noted that the purpose of Title VI was not to penalize recipients of federal financial assistance but to end discrimination. Id. To that end, Senator Humphrey said, agencies would have broad discretion to adopt measures which would accomplish the goal of eliminating discrimination in a "state agency" or "institution" which engages in discrimination. He said, "[a]ny non-discrimination requirement an agency adopts must be supportable as tending to end racial discrimination with respect to the particular program or activity to which it applies." Id. Humphrey pointed out that agencies were authorized to achieve compliance "by any other means authorized by law" in order to encourage them to find ways to end discrimination without refusing or terminating assistance. Id.

B. Title IX

Congress also intended that Title IX, the first of several discrimination statutes to be modeled on Title VI, also be broadly interpret-

[page 6]

ed. For example, Senator Birch Bayh, chief sponsor and floor manager of Title IX, said that Congress intended that Title IX be –

> a strong and comprehensive measure [that] is needed to provide women with solid legal protection from persistent, pernicious discrimination which is serving to perpetuate second-class citizenship for American women. 118 Cong. Rec. 5804 (1972).

And during the Title IX debate, several members of Congress stated that Title IX prohibitions would apply to universities " . . . across the board . . . " irrespective whether individual departments received federal funds. See e.g. 118 Cong. Rec. 39256, (remarks of Rep. Green); 117 Cong. Rec. 30407 (1971) (intent is to "provide equal access for women and men students to the educational process and the extracurricular activities in a school) (remarks of Senator Bayh); 117 Cong. Rec. 30408 (sanctions directed at institution) (remarks of Senator Bayh); 117 Cong. Rec. 39251-52 ("*institutions* of higher learning [must] practice (equality or not come to Federal Government for financial support") (remarks of Rep. Mink) (emphasis added).

More than a decade after the passage of title IX, former Senator Birch Bayh returned to the Senate to reiterate "what we, as legislators, understood about the law at that time." Testimony of Birch Bayh, Joint Hearings on H.R. 5490, p. 41, May 9, 1984. According to Mr. Bayh, Title IX was enacted by a Congress which was familiar with the broad manner in which Title VI had been enforced. There was no need to restate these understandings at the time Title IX was enacted.

> . . . if you look back into what we in Congress understood title VI to mean at the time we adopted title IX, it is no wonder we did not feel it necessary to repeat, every time we mentioned the purpose and scope of the legislation, that we intended broad, institutionwide coverage . . .
> . . . [W]e were building on an understanding of Title VI that had never suggested narrow coverage was intended. Id.

According to Senator Bayh, institutionwide coverage was necessary in order to accomplish the broad purposes of the bill.

> Nothing else would have made any sense if our goal was meaningful coverage and effective enforcement. Id.

C. *Section 504 of the Rehabilitation Act*

Congress also intended that the prohibitions of Section 504 of the Rehabilitation Act also apply institutionwide. Key sponsors of earlier versions of Section 504 spoke of the broad purposes which would underlie a prohibition against handicap discrimination. For example, Representative Vanik stated that –

> my proposed legislation will insure equal educational and employment opportunities for the handicapped by making discrimination illegal in federally assisted programs and activities. 118 Cong. Rec. 526

[page 7]

And Senator Percy emphasized the spectrum of rights which would be embodied in a prohibition against handicap discrimination.

> The bill would guarantee the handicapped equal opportunity to education, job training, productive work, due process of law, a decent standard of living, and protection from exploitation, abuse, and degradation.

Just a year after the passage of Section 504, Congress clearly expressed the view that prohibition against discrimination included in Section 504 was to be read as broadly as that included in Title VI.

> Section 504 was patterned after, and is almost identical to, the antidiscrimination language of . . . [Title VI] . . . and [Title IX] . . . the Section therefore constitutes the establishment of a broad government policy that programs receiving Federal financial assistance shall be operated without discrimination on the basis of handicap. Senate Report (Labor and Public Welfare Committee) (No. 93-1297, November 16, 1974, 120 Cong. Record p. 30534 (1974).

D. Age Discrimination Act of 1975

The Age Discrimination Act must also be read in the same fashion. The statute is virtually identical to the previous nondiscriminatin [sic] statutes. When the Congress passed this legislation, it did so against a rich background of legislative and enforcement experience. This background is evidenced in the complete absence of controversy during Congressional consideration of the ADA, and the swift passage of the legislation. See House Report No. 94-67 at 16, March 14, 1975 ("Committee drafted this section to draw on the experience this natin [sic] has had in combatting [sic] . . . other prejudices"). *See also National Alliance et al.* v. *Bowen*, 789 F. 2d 931, 934 (5th Cir. 1986) (ADA) modeled on Title VI.)

Conclusion

The inescapable conclusion is that Congress intended that title VI as well as its progeny – Title IX, Section 504, and the ADA – be given the broadest interpretation. All four statutes were passed to assist in the struggle to eliminate discrimination from our society by ending federal subsidies of such discrimination. Congress understood that these goals could be achieved if the Federal government used its power and authority to end discrimination.

Prior to the Grove City Decision, the Executive Branch Asserted Authority to Enforce the Nondiscrimination Statutes Institution-Wide

Beginning in 1964 with the enactment of Title VI and until the Grove City decision in 1984, the Federal officials charged with enforcing these civil rights statutes interpreted them to be institution-wide in their coverage.

For example, David Tatel who was Director of the Office for Civil Rights of the Department of Health, Education and Welfare, from

[page 8]

1977-1979, testified that HEW had consistently interpreted Title VI to require institution-wide coverage.

> This broad interpretation was grounded on the language of the statute, its legislative history, and the well-accepted constitutional principle that all levels of government must steer clear of providing public revenues to institution which discriminate on the basis of race or national origin.

Testimony of David Tatel, Joint Hearings on H.R. 700, Page 1177; Id. at 1189. (1985); Testimony of David Tatel, Hearing on S. 557 transcript 143, (1987); Testimony of David Tatel, Hearings on S. 2568, p. 162-177.

Another former administration official, Dan Marcus, who served with the Department of Health, Education and Welfare from 1977 to 1980, endorsed Mr. Tatel's assessment of prior administration practice. Testimony of Dan Marcus, Esq, Joint Hearings on H.R. 700, page 1189 (1985).

A former general counsel to HEW, Peter Libassi, also supported this view of the breadth of the civil rights statutes. Mr. Libassi, who was general counsel of HEW from 1977-1979 and Director of OCR at HEW from 1966-1968 testified in 1984 that HEW official did recognize that there might be "interpretations of Title VI restricting its impact to the particular activity receiving federal funds. That narrow construction was rejected. It was rejected on the basis of our understanding of the realities of legislative enforcement." Joint Hearings on H.R. 5490, p. 64, May 9, 1984.

Cynthia Brown, former Assistant Secretary for Civil Rights of the Department of Education from 1980 to 1981, Deputy Director of the office for Civil Rights in HEW, and an employee of HEW's Office of Civil Rights from 1966-1970, gave similar testimony.

> Every administration charged with enforcing Title IX, as well as title VI . . . has interpreted coverage of these antidiscrimination laws in the same broad manner.

Testimony of Cynthia Brown, Hearings on S. 2568, p. 376, June 5, 1984.

Mary Berry, currently a member of the Civil Rights Commission, a former Assistant Secretary for Education, former chancellor at the University Colorado, and former director of the Higher Education Division in the Office of Civil Rights-HEW, also testified that previous administrations interpreted these laws broadly. Testimony of Mary Berry, Joint Hearings on H.R. 5490, at 93-95 May 9, 1984.

She said that post-Grove City, administration officials have encountered serious difficulty complying with the "program specific" enforcement mandate because available data system did not permit the tracing of federal funds. This is so, Commissioner Berry said, because existing data systems did not include program specific information.

> The . . . Federal Assistance Award Data System, set up in 1983, as a central source for data . . . doesn't tell you exactly where on campus or in an institution the money goes.
>
> It just tells you that the place gets money. And the reasons why that is the case is that because before Grove City
>
> [page 9]
>
> nobody had to identify exactly where the money was before you could engage in investigation. Since Grove City . . . under Title IX, 23 education complaints involving large institutions have been closed by the Department because of a question of whether the activities were in some program that was funded directly by the Federal

> Government. These were cases that earlier were proceeding without any trouble. Id. at 94.

Former Justice Department officials under both Republican and Democratic Administrations supported the views of officials of other agencies on the breadth of the statutes. Stanley Pottinger and Drew Days, former assistant Attorneys General for Civil Rights, in the Ford and Carter administrations respectively, testified that the Department of Justice gave a broad interpretation to Title VI, Section 504, and Title IX. Mr. Pottinger said that –

> [t]here was no requirement to make a prior finding that the alleged discrimination occurred in a program or activity receiving federal funds and indeed the Department would not have been able to do that. Joint Hearings on H.R. 5490, at 256.

> Congress should now make clear . . . what we all thought has been made clear in 1964, again in 1972, again in 1973, and through subsequent years by the consistent administrative and law enforcement practice. Joint Hearings on H.R. 5490, at 258, May 1984.

Mr. Days was equally strong in his recollection of administration practice. Joint Hearings at 258-261. In his view, the "overall objective . . . [of these statutes] . . . was to make certain, in the areas of Federal funding, that taxpayer's dollars were not used to initiate or perpetuate . . . bias and prejudice . . . " Joint Hearings at 258.

According to Mr. Days, a –

> narrow reading of the law denigrates the historic work of . . . [Representative Emmanuel] Celler and . . . [Senator Hubert] Humphrey,

> whose vision in promoting the passage of Title VI pointed the way for later leaders in the Congress to address forcefully the shameful treatment of women, the handicapped, and the aged by recipients of Federal money.

In 1975 Caspar Weinberger, then Secretary of HEW, told Congress that coverage of Title IX was exceedingly broad and that this broad coverage was reflected in the Title IX regulations promulgated during his tenure . . . Secretary Weinberger said –

> The final regulation applies to all aspects of all educational programs or activities of a school district, institution of higher education, or other entity which receives Federal Funds for any of those programs. If Congress wished to excluded [sic] athletics, for example, as so many people seem to wish, Congress could have easily have said so. However Congress . . . made [sic] very clear athletics should be covered by the regulation . . . Sex Discrimination regulations,
>
> [page 10]
>
> hearings Before the Subcommittee on Post Secondary Education of the Committee on Education and Labor, House of Representatives, June 26, 1975, page 438.

These views are corroborated by evidence that the Department of Education conducted institution and system wide compliance reviews prior to the Grove City decision. Hearings on S. 557, prepared testimony of Elaine Jones, Exhibits A-1 and A-2, and prepared testimony of Elaine Jones, transcript page 6, April 1, 1987.

Thus, the evidence is overwhelming that the institution wide coverage that Congress intended was understood and implemented by previous administrations.

Judicial Decisions Prior to Grove City Endorsed Broad Coverage of the Civil Rights Statutes

With few exceptions, courts consistently interpreted the nondiscrimination statutes broadly prior to the *North Haven*[1] and *Grove City* decisions. This pattern was especially strong in the enforcement of Title VI. Court decisions rarely addressed the issue explicitly, but the facts left no doubt that courts assumed and endorsed institution-wide coverage. See e.g. *Board of Public Instruction of Taylor Co.* v. *Finch*, 414 F. 2d 1068 (5th Cir. 1969) (assumes institution-wide coverage and that pinpointing limited to fund termination); *United States* v. *Jefferson Co. Board of Education*, 372 F. 2d 836 (5th Cir. 1966), aff'd en banc, 380 F. 2d 385, *cert. denied sub nom Caddo Parish Board of Education* v. *United States*, 389 U.S., 840 (1967) (Title VI institution wide desegregation order appropriate); *Bossier Parish School Board* v. *Lemon*, 370 F. 2d 847, 852) (5th Cir.), cert. denied, 388 U.S. 911 (1967) (systemwide application of Title VI) institution-wide desegregation order) *Yakin* v. *University of Illinois*, 508 F. Supp. 848 (N.D. Ill. 1981) (federal financial assistance to university triggers department coverage) *United States* v. *El Camino Community*

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[1] In *North Haven Board of Education* v. *Bell*, 456 U.S. 511 (1982), the Supreme Court's holding was that Title IX prohibited sex discrimination in employment in educational institutions. In dicta, however, the Court suggested that Title IX should be viewed as "program specific" in its coverage as well as its fund termination provisions. This dicta paved the way for Grove City.

College District, 454 F. Supp. 825 (C.D. Cal. 1978). aff'd, 600 F. 2d 1258 (9th Cir. 1979), cert. denied, 444 U.S. 1013 (1980) (Title VI investigation of entire College appropriate); *Bob Jones University* v. *Johnson*, 396 F. Supp. 597 (D. S.C. 1974) (Veterans Administration education grants aid to whole university) *Flanagan* v. *President & Directors of Georgetown Coll*, 417 F. Supp 377 (D.D.C. 1976) (financial aid activities covered); . . .

Courts also assumed that institutional wide coverage was appropriate under Title IX. See e.g. *Haffer* v. *University*, 524 F. Supp 531 (E.D. Pa 1981), affirmed 688 F. 2d 14 (3rd Cir. 1982) (athletic program which did not receive earmarked funds covered), but see *Rice* v. *President and Fellows of Harvard College*, 663 F. 2d 336 (1st Cir. 1981). Two courts of appeals read Section 504 narrowly, *Brown* v. *Sibley*, 659 F. 2d 760 (5th Cir. 1980); *Simpson* v. *Reynolds Metals Co.*, 629 F. 2d 1226 (7th Cir. 1980) but other decisions read the statute broadly. *Wolff* v. *South Colonie School District*, 534 F. Supp. 758 (N.D. N.Y. 1982) (schools [sic] trips covered) . . .

[page 11]

Judicial recognition of institution wide coverage waned only after the Supreme Court opinion in *North Haven*. See e.g. *Dougherty County School System* v. *Bell*, 694 F. 2d 78 (5th Cir. 1982) (follows North Haven dicta that Title IX requires program specific interpretation). Prior to *North Haven* the weight of authority was clearly on the side of institution wide coverage of the civil rights statutes.

The Civil Rights Restoration Act of 1987 is urgently needed

The impact of the Supreme Court decision was immediate. On March 8, 1984 – a little over a week after the *Grove City College* decision – the Department of Education dropped sex discrimination charges against the University of Maryland's intercollegiate athletics program because the athletics program did not receive direct federal funding. The Department's Office for Civil Rights – which enforces Title VI, Title IX, Section 504 and the Age Discrimination Act as they apply to education – had uncovered discrimination in several areas, including travel and per diem allowance, the provision of support services, and the accommodation of student interests and abilities. Yet, female athletes and coaches at the University of Maryland and other universities no longer had federal protection against this discrimination.

The University of Maryland case was just the beginning. In the wake of the *Grove City College* decision, at least 674 complaints filed under the four civil rights statutes in the Department of Education have been closed, in whole or in part or suspended. At least 156 Department-initiated compliance reviews also have been dropped or narrowed. (Letter from Alicia Coro, Acting Assistant Secretary for Civil Rights, Department of Education to Chairman Kennedy, March 31, 1987).

In addition, other cases that were in the formal enforcement stage still are in jeopardy. These are cases where discrimination has been found, voluntary compliance was refused, and recipients are using the Supreme Court's decision as a defense against federal enforcement.

The decision has created absurd results in many instances. Complaints are not investigated because the alleged discrimination took place in a building not constructed or renovated with federal assistance. When complaints are investigated, the whole process takes longer because the federal government has to search for federal money connected with a specific program. The paperwork for institutions has increased as they are asked to show precisely where the current federal dollars are, and in some instances where past federal assistance went (as in the case of buildings or equipment).

Clear violations of federal law go uncorrected while students lose valuable educational benefits that can rarely be recovered and employees lose jobs or job opportunities. Prolonged debate takes place over what constitutes a "program or activity" under the civil rights law, while the universities, schools, and correctional facilities receive millions of federal dollars.

A few examples from a recent report, *Federal Funding of Discrimination: The Impact of Grove City College* v. *Bell*, issued in 1987 by the National Womens' Law Center, illustrates the civil

[page 12]

rights enforcement problems in the aftermath of the *Grove City College* decision:

> A Black high school student in the Haddon Heights School District, filed a complaint alleging that her school's chapter of the National Honor Society had failed to induct her because of her race. In spite of being ranked fifth in her class and participating in a wide variety of

> extracurricular activities, she was not among the sixteen students invited to join the Society. OCR closed the case because it found the alleged discrimination did not occur in a program or activity which was a direct recipient of federal financial assistance from the Department of Education.
>
> A first year medical student at the University of California at Davis alleged that she had been sexually harassed by a professor who made explicit sexual remarks to her, offered to give her better grades in exchange for sexual favors, and finally threatened to use his alliances with other professors to manipulate her grades. Although the medical school received federal funding through the Department of Education, no money was earmarked for the educational program for first year students or the Department of Surgery in which the professor taught. OCR closed the case in January 1986 because it decided the Grove City "program or activity" requirement could not be satisfied.

Other cases are summarized in a 1986 report of private civil rights organizations, *Injustice Under Law*:

> A student at Hill Top Beauty School in Daly City, California complained to OCR that clients were more often assigned to white students than Black students, that Black students were assigned to Black clients and that clean up duties not properly the responsibility of students were given to Black students. Many students attend Hill Top with the help of federal assistance such as Pell Grants.

But OCR decided it could not investigate the complaint because the alleged discrimination occurred in the Practical Training part of the cosmetology course which did not receive direct federal funds. The case was closed. Now there will never be any investigation of the truth or falsity of the charges of discrimination. OCR #09-83-4004.

A Northeastern University (Boston, Massachusetts) student filed a Title IX complaint. She said the university failed to take action to redress a sexual harassment complaint and had no grievance procedure as required by Title IX. Prior to the Grove City College decision, OCR only had to determine that the university received federal funds. Now OCR must find whether federal funds go to the Program in which discrimination is charged. In this case it was the Economics Department located in Lake Hall. And the University had received $2,216,000 under the College Housing Loan Program to renovate student housing, as well as $9.9 million in student aid for 1983-84.

[page 13]

But OCR decided that it could not investigate the complaint because Lake Hall, where the alleged discrimination occurred, was not built or renovated with federal loans. Ironically, if the alleged sexual harassment had occurred in student dorms which were renovated with federal loans, the complaint would have been investigated. This case is on "policy hold" at the Education Department. OCR #01-84-2020.

A maintenance worker at the University of Charleston in West Virginia complained to OCR that he had been the victim of discrimination in

> employment because he was disabled. The University's lawyers told OCR that it received no federal funds for maintenance and therefore OCR had no authority to investigate. Since 1979 the University of Charleston has received approximately $3,376,182 in federal funds from the Department of Education, including $472,194 in federal student aid in the 1983-84 school year.
>
> But OCR put this complaint on "policy hold" because it could not link the allegation of discrimination to a specific, federally funded program. Section 504 is the only federal law protecting disabled persons from employment discrimination based on their handicap. Without an OCR investigation, this disabled employee has no other recourse under federal law. OCR #03-84-2040.

In an administrative proceeding against Mecklenburg County Public Schools, Virginia, the school district's motion to dismiss the proceedings was granted by an administrative law judge because the district's federal funds were not earmarked to the specific program where discrimination was alleged. The case was dismissed although OCR had determined that the school system used grouping policies and procedures which resulted in racially identifiable classes without educational justification; employed a curricular tracking system which resulted in racially identifiable tracks; employed policies and procedures which did not permit movement between those tracks from middle school to high school. As a result OCR found minority students were locked into segregated classes that denied them educational opportunity. But because of Grove City's limited view of the

law, Title VI did not provide a remedy for the students. The case is under review.

In Pickens County, South Carolina, junior and senior high school students may choose between co-educational or same-sex physical education classes. However, if too few students sign up for the same sex classes, students who chose co-ed classes are assigned to sex segregated Physical Education classes. The Office for Civil Rights found that this practice discriminated against boys and girls, in violation of Title IX (sex discrimination). The school district claimed that OCR did not have jurisdiction because none of the $2 million in federal funds received by the school district were used for physical education. An Administrative Law Judge and the Civil Rights Reviewing Authority agreed with the school district, and OCR did not appeal the decision. The case is closed and the

[page 14]

district continues to operate its physical education program in a discriminatory manner.

During the hearings on S. 557, the committee heard the testimony of Mr. Jerry Kicklighter of Bellville, Georgia, who has epilepsy, and gave the following account:

> In the summer of 1974 I was hired by DeKalb Community College to be an adjunct instructor. A few months later, in September 1974, I was hired as a full instructor in botany-biology. I worked full time until 1977. I enjoyed my job and consistently received positive performance evaluations. In April 1977, I discovered that my contract was not going to be renewed.

I requested that the College give me a hearing and was refused. The college never put anything in writing as to why I was terminated – the law did not require that because I wasn't tenured yet.

I found out, in an off-the-record conversation with the Chairman of my department that I was terminated because of my epilepsy. Mr. Chairman, at worst, I had only two seizure a week – lasting a total of 40 seconds each, maximum. They were like daydreaming for a minute – I always went right back to my work with no problem, after one of these episodes. The College even had a letter from my doctor stating that even these small petit mal seizures were being treated and that they in no way posed any hazard to my students.

I lost my job because of 80 seconds a week.

I thought this was wrong. I talked to an attorney who told me that the government followed laws and regulations that insured equal opportunity for all citizens. He told me that I shouldn't file a formal lawsuit because I was covered by those laws. So I went to the EEOC officer at the college who recommended that I file both a complaint with the Office of Civil Rights at the Department of Education and with the Office of Federal Contract Compliance at the Department of Labor. I did exactly what they instructed me to do.

Seven years later, on May 24, 1984, OCR sent me a letter stating that, because of the *Grove City* decision, they didn't have jurisdiction to pursue my case. The government had established that DeKalb Community College received over a quarter of a million dollars in federal

funds for the 1976-77 school year, but they couldn't trace the funds directly to my job, as the *Grove City* decision required.

In addition to these cutbacks in administrative enforcement, the lower federal courts have also begun to incorporate *Grove City's* restrictive interpretation of "program or activity" into Section 504 cases as well as Title IX, Title VI and Age Discrimination Act cases.

In written testimony submitted to the Committee, Arlene Mayerson of the Disability Rights Education and Defense Fund, Inc., described some of the casualties of the *Grove City College* decision:

[page 15]

In *Jacobson* v. *Delta Airlines, Inc.*, 742 F.2d 1202 (9th Cir. 1984), the court held that the airline did receive federal financial assistance in the form of subsidies for small community service, but the receipt of such payments only subjected the small community service program – not the entire airline – to the civil rights laws. Since the alleged discrimination against plaintiff did not take place in connection with this program, Section 504 was found to be inapplicable and the case was dismissed. As a result, Delta's practice of requiring disabled persons to sign "medical release forms" acknowledging that they may be removed from a flight at any point for unspecified reasons, was allowed to stand. This result occurred despite the fact that the court found Delta's practice to be otherwise unreasonable under substantive Section 504 laws, and despite the fact the Delta received considerable and varied types of federal financial assistance.

Price v. *Johns Hopkins University, et al.*, Bench Opinion, Civil Number HM83-4286 (D.C. Maryland 1985), involved a blind philosophy professor who was denied access to an adequate number of college work study readers by the University and was forced to pay for necessary extra readers from his own funds. Price asserted that the relevant "program or activity" for Section 504 purposes was the entire university. Citing *Grove City* and *Jacobson*, the court ruled that a program-specific approach was in order, and thus the case must be limited to the work study program only.

Gallagher v. *Pontiac School District*, No. 85-1134, (6th Cir), Slip Opinion, December 16, 1986.

A handicapped student's case was dismissed because the court held that there was no federal assistance to a specific program even though the student participated in special education which received federal funds.

Russell v. *Salve Regina College*, C.A. No. 85-06 28-S U.S. Dist. Ct. of R.I., Slip opinion, November 17, 1986.

The court held that there was no cause of action under Section 504 in a case alleging discrimination in a nursing program where the only money received by the college is through financial aid to students.

Foss v. *City of Chicago*, 640 F. Supp. 1088 (N.D. Ill. 1986) The court held that a handicapped firefighter could not sue the Chicago Fire Department under Section 504 because he was not employed in a specific program receiving federal financial assistance. Although revenue sharing funds could have been distributed to the fire department because they were not earmarked, the court

held that the fact that they were not so distributed avoids Section 504 coverage. The specific grants to the fire department concerned programs unrelated to plaintiff's employment.

Chaplin v. *Consolidated Edison Company,* 628 F.Supp. 143 (S.D.N.Y. 1986).

Receipt of CETA and WIN training grants did not suffice to invoke coverage of the entire company.

[page 16]

The court held that coverage is limited to persons participating in the training programs.

Greater Los Angeles Council of Deafness v. *Zolin, County of Los Angeles,* No. CV 81-6338-ER, Slip Opinion (D.C. CA July 2, 1984)

Refusal to seat deaf jurors may not be challenged under Section 504 where superior court has been in the past but is not in the present receiving federal financial assistance. Unearmarked revenue sharing funds were held not to be sufficient to invoke coverage, if not specifically dispersed to the superior court.

Bradford v. *Iron County C-4 School District,* C. No. 82-303-C(4), Slip Opinion, (E.D. MO June 13, 1984)

The court held that unrestricted federal funds trigger coverage, but also held that the defendant has the opportunity to prove that the program or activity at issue did not utilize the unrestricted federal funds.

In sum, the hard won gains of the past two decades have been significantly eroded in the three years since the *Grove City College* case was decided. Congressional action

is urgently needed to restore the broad prohibition on the use of federal funds to discriminate.

VI. Major Provisions of S. 557, as Reported

Coverage

The definition of "program or activity" and "program" contained in the bill describe the application of the principle of institution-wide coverage to the public and private entities which are recipients of federal financial assistance.

A. State and Local Governments

The bill provides that when any part of a state or local government department or agency is extended federal financial assistance, the entire agency or department is covered. If a unit of a state or local government is extended federal aid and distributes such aid to another governmental entity, all of the operations of the entity which distributes the funds and all of the operations of the department or agency to which the funds are distributed are covered.

Examples: If federal health assistance is extended to a part of a state health department, the entire health department would be covered in all of its operations.

If the office of a mayor receives federal financial assistance and distributes it to local departments or agencies, all of the operations of the mayor's office are covered along with the departments or agencies which actually get the aid.

B. Education Institutions and School Systems

S. 557 provides that when federal financial assistance is extended to any part of a college, university, other postsecondary institution, or public system of higher education, all of the operations of the institution or education system are covered. Postsecondary institution is a generic term for any institution which offers education beyond the twelfth grade. Examples of postsecondary institutions would include vocational, business, and secretarial schools.

[page 17]

When federal financial assistance is extended to any part of a local educational agency (LEA), a system of vocational education, or other elementary or secondary school system, all of the operations of the entire LEA or school system are subject to the requirements of the four civil rights laws. An individual elementary or secondary school which is extended federal financial assistance and which is neither part of an LEA nor part of a school system will be covered in its entirety as an entity which is principally engaged in the business of providing education pursuant to part (3)(A) of the definition of "program or activity" in the bill. For two or more schools to be considerated a "school system", there must be some significant linkage between them. Thus, for example, any group of schools whose only connection to one another is that they belong to some umbrella advocacy or membership group, or that they are accredited by one central accrediting agency, would not constitute a school system.

The language "all of the operations of" an educational institution or system would include, but is not

limited to, the following – traditional educational operations, faculty and student housing, campus shuttle bus service, campus restaurants, the bookstore, and other commercial activities.

Examples: If the department of computer sciences at a college receives a federal grant, the entire college is prohibited from discrimination under the four civil rights laws.

If federal financial assistance is extended to one of three secondary schools which comprise a system operated by a Catholic Diocese, all of the operations of all three of the schools in the system are covered.

C. Corporations and Other Private Entities

The bill provides that a corporation, partnership, or other private organization or sole proprietorship will be covered in its entirety if it receives federal financial assistance which is extended to it as a whole or if it is principally engaged in certain kinds of activities. In all other instances, coverage will be limited to the geographically separate plant or facility which receives the federal funds.

Federal financial assistance extended to a corporation or other entity "as a whole" refers to situations where the corporation receives general assistance that is not designated for a particular purpose. Federal financial assistance to the Chrysler Company for the purpose of preventing the company from going bankrupt would be an example of assistance to a corporation "as a whole." Federal aid which is limited in purpose, e.g., Job Training

Partnership Act (JPTA) funds, is not considered aid to the corporation as a whole, even if it is used at several facilities and the corporation has the discretion to determine which of its facilities participate in the program. A grant to a religious organization to enable it to extend assistance to refugees would not be assistance to the religious organization as a whole if that is only one among a number of activities of the organization. Further, federal financial assistance that is earmarked for one or more facilities of a private corporation or other private entity when it is extended is not assistance to the entity "as a whole." Nor does S. 557 embody a notion of "freeing

[page 18]

up." Federal financial assistance to a corporation for particular purposes does not become assistance to the corporation as a whole simply because receipt of the money may free up funds for use elsewhere in the company.

In specifying limited coverage of an entire plant as the geographically separate facility," the bill refers to facilities located in different localities or regions. Two facilities that are part of a complex or that are proximate to each other in the same city would not be considered geographically separate.

If an entity is extended federal financial assistance "as a whole," all of its operations at each of its locations must be conducted in compliance with these laws. Likewise, if the entity or individual is principally engaged in education, health care, housing, social services, or parks and recreation, all of its activities at each of its plants must comply with these laws if any part of the entity

receives federal aid. Because they are principally religious organizations, institutions such as churches, dioceses and synagogues would not be considered to be "principally engaged in the business of providing education, health care, housing, social services or parks or recreation," even though they may conduct a number of programs in these areas.

It is important to note that the evidence presented to the committee supports corporation-wide coverage for all types of corporations receiving federal financial assistance prior to the *Grove City College* decision. In the 99th Congress, the sponsors of the Civil Rights Restoration Act in the House of Representatives accepted an amendment to restore institution-wide coverage only for corporations and other private entities which are extended assistance "as a whole" or that provide services that are traditionally regarded as within the public sector, i.e., those enumerated in part (3)(A)(ii) of the definition of "program or activity" in S. 557. The bill has left that compromise intact.

If a corporation, partnership, other private organization, or sole proprietorship is not principally engaged in one of the activities delineated above, and receives federal financial assistance which is not extended to it "as a whole," only the full operations of the geographically separate facility will be covered by the civil right laws.

Example: If a private hospital corporation is extended federal assistance for its emergency room, all the operations of the hospital, including for example, the operating rooms, the pediatrics department, admissions, discharge offices, etc., are covered under Title VI, section

504, and the Age Discrimination Act. Since Title IX is limited to education programs or activities, it would apply only to the students and employees of educational programs operated by the hospital, if any.

If corporation X is a chain of five nursing homes, federal financial assistance to one of the nursing homes will require compliance with the civil rights laws in all of the operations of all five of the nursing homes, subject to the education limitation in Title IX described in the preceding example.

If the Dearborn, Michigan plant of General Motors is extended federal financial assistance for first aid training through the state department of health, all of the operations of the Dearborn plant

[page 19]

are covered. (The state health department is also covered as a state agency to which federal financial assistance is extended.)

D. Other Entities

The committee amendment provides in part (4) of the definition of "program or activity" that other entities established by two or more of a (1) state local government entity; (2) education institution or system; or (3) corporation, partnership, other private organization or sole proprietorship, will be covered in their entirety.

This so-called catch-all provision originated in the House version of the Civil Rights Restoration Act in the 99th Congress. The bill's sponsors recognized that it is impossible to describe precisely the thousands of entities

which receive the more than $200 billion in federal financial assistance which is distributed annually. Nonetheless, receipt of that federal financial assistance requires compliance with the antidiscrimination provisions of Title VI, Title IX, section 504, and the Age Discrimination Act. The bill provided that entities receiving federal financial assistance which were not specifically described in the bill's definition of "program or activity" would be covered by the four civil rights laws in a manner analogous to the entity receiving the aid. Thus, a multistate, regional transportation commission which receives federal financial assistance would be covered in its entirety, like a state Transportation Department.

Some members of the House expressed the concern that the catch-all provision was too vague and open-ended. The House sponsors of the bill agreed to a compromise provision limiting the catch-all provision to "any combination comprised of two or more of the entities described" in the bill. In this Congress, the committee has accepted language proposed by Senators Thurmond and Hatch to clarify that part (4) of the "program or activity" definition, the catch-all provision, applies to entities which (1) are not described in parts (1), (2), or (3) of the definition of "program or activity" in the bill; and (2) are established by two or more entities which are described in parts (1), (2), or (3) of the program or activity definition.

Example: A school district and a corporation establish the PPP company – a public-private partnership whose purpose is to provide remediation, training and employment for high school students who are at risk of school failure. The PPP company applies for and is

extended federal financial assistance. All of the operations of the PPP company would be covered even if the federal financial assistance was only to one division or component of the company.

This is appropriate because an entity which is established by two or more of the entities described in (1), (2), or (3) is inevitably a public venture of some kind, i.e., either a government-private effort (1 and 3), a public education-business venture (2 and 3) or a wholly government effort (1 and 2). It cannot be a wholly private venture under which limited coverage is the general rule. The governmental or public character helps to determine institution-wide coverage. For example, in a Catholic diocese where 3 parishes receive federal aid, the parishes are geographically separate facilities which receive federal aid, and the diocese is a corporation or private organization of which the parishes are a part. Only the three parishes which receive federal aid are covered by the antidiscrimi-

[page 20]

nation laws. Both the parishes and the diocese are entities described in paragraph (3), therefore paragraph (4) would not apply.

The governmental or public character of entities covered by paragraph (4) helps to determine institution-wide coverage. Even private corporations are covered in their entirety under (3) if they perform governmental functions, i.e., are "principally engaged in the business of providing education, health care, housing, social services, or parks and recreation."

It should be added that no coverage of the separate entities which founded the PPP company is obtained under (4). They would be covered only by virtue of any federal financial assistance extended to them as entities. So, if the school district received assistance through a subgrant for the PPP company (or through the state or any other entity), it would be covered under (2). Likewise, if the corporation received assistance through PPP or some other entity, it would be covered by virtue of (3) and the distinctions made in (3) would determine how much of the corporation was covered.

Fund Termination

S. 557 will leave in effect the enforcement structure common to each of these statutes. The section in each statute states that the termination of assistance "shall be limited . . . to the particular program, or part thereof, in which such noncompliance has been so found." The bill defines "program" in the same manner as "program or activity", and leaves intact the "or part thereof" pinpointing language.

The seminal case dealing with fund termination is *Board of Public Institution of Taylor County* v. *Finch*, 414 F.2d 1068 (5th Cir. 1969), a Title VI case decided in 1969. Under that case, the Court noted that:

> If the funds provided by the grant are administered in a discriminatory manner, or if they support a program which is infected by a discriminatory environment, then termination of such funds is proper. (at 1078).

Under the *Taylor* ruling, Federal funds earmarked for a specific purpose would not be terminated unless discrimination was found in the use of those funds or the use of the funds was infected with discrimination elsewhere in the operation of the recipient. In the case of Grove City College, for example, if there is discrimination in the math department, a fund termination remedy would be available because the funds from BEOG's flow throughout the institution and support all of its programs.

Religious Tenet Exemption in Title IX

Since its enactment in 1972, Title IX has contained an exemption for educational institutions "controlled by a religious organization." The exemption permits an education institution to seek an exemption from the prohibition on sex discrimination in Title IX where the application of Title IX "would not be consistent with the religious tenets of such organization."

S. 557 leaves the religious tenet exemption in Title IX intact and clarifies that the exemption is as broad as the Title IX coverage of

[page 21]

education programs and activities. Thus, a religiously controlled education program or activity which receives federal financial assistance and is therefore subject to the sex discrimination prohibition in Title IX, but is not part of an education institution, would still be within the scope of the religious tenet exemption. The inclusion of clarifying language for the religious exemption was

prompted by concern expressed by the Catholic Conference in previous Congresses. Bishop Joseph Sullivan, who testified on behalf of the U.S. Catholic Conference before the committee on S. 557, commented approvingly on the religious tenet exemption in S. 557:

> When we testified on this legislation in the last Congress, we requested that the religious tenet provision be extended to ensure that the non-educational institutions would also be protected. As we read S. 557 in its present form, the extension of the religious tenet provision beyond education institutions has been made.

The record of implemenation [sic] of the religious tenet exemption does not indicate any need to broaden the religious tenet provision. In March 1977, HEW requested every educational institution receiving federal assistance to complete and return an Assurance of Compliance with Title IX. The Assurance form contained instructions for claiming a religious exemption. The Attachment which accompanied the Assurance form defined what HEW considered to be religious "control":

> An application or recipient will normally be considered to be controlled by a religious organization if one or more of the following conditions prevail:
>
> (1) It is a school or department of divinity; or
>
> (2) It requires its faculty, students or employees to be members of, or otherwise espouse a personal belief in, the religion of the organization by which it claims to be controlled; or

> (3) Its charter and catalog, or other official publication, contains explicit statement that it is controlled by a religious organization or an organ thereof or is committed to the doctrines of a particular religion, and the members of its governing body are appointed by the controlling religious organization or an organ thereof, and it receives a significant amount of financial support from the controlling religious organization of an organ thereof.

In response to a request from Chairman Kennedy, the U.S. Department of Education, the agency charged with administering Title IX religious exemption requests, provided the following information by letter dated May 19, 1987:

> OCR has received requests for religious exemptions from 227 institutions since July 21, 1975, the date the Title IX regulation was implemented, to the present.
>
> OCR has granted exemptions to 150 institutions. Under the 1985 religious exemption project aimed at resolving the requests pending at that time, OCR closed 79 request files for a variety of reasons, including, but not limited to:
>
> [page 22]
>
> the institution withdrew the request; the institution did not need a religious exemption since its admission practices were already exempt under 34 C.F.R. Sec. 106.15; the institution had ceased operations; or the institution failed to respond to repeated requests from OCR for additional information sufficient to act on the exemption request. Most of the institutions from which

> additional information was requested submitted information sufficient for a determination. The request files were closed for those institutions that did not respond to OCR's repeated requests for information. Two of the 79 institutions whose files were closed under the 1985 project later requested and were granted exemptions and thus are included in the total of 150 institutions granted exemptions. OCR has never denied a request for religious exemption. No requests for religious exemption are pending at this time.

The two most frequently cited reasons for requests for religious exemptions involved tenets calling for sex discrimination in institutions training students for the ministry and differential treatment of pregnant students and employees, particularly if unmarried. A significant number of requests also sought to treat men and women differently in athletic programs.

Some excerpts from actual request letters are illustrative of the practices sought to be exempt from Title IX:

> [O]ur religious standards so strongly condemn sexual activities outside the marriage that we must reserve to ourselves the handling of Sacred Scripture violations on the part of students and staff. For instance, if a woman student is found to be pregnant she could no longer be allowed to remain with other unmarried women in the dorm.
>
> * * *
>
> The College requests exemption from this paragraph in that marital status could indeed be a factor in job suitability in certain instances. Since the Scriptures teach that the husband is

the head of the wife . . . a woman whose employment came in conflict with her marriage obligations would be expected to be in submission to her husband. On this basis, the College may find it necessary to make an employment decision based upon marital status.

* * *

All of our physical education classes are open to both men and women with the exception of swimming classes. The College has never allowed mixed swimming in any of the activities which it sponsors, and this action has been enforced because of the position on what is "modest attire."

* * *

. . . College is committed to providing as many opportunities as possible for its women in the area of intramural and intercollegial athletics. However, the college has

[page 23]

strong beliefs concerning the teachings of the Bible on the subject of modesty. . . . College therefore, must review from time to time the dress of athletic teams that visit on our campus in order to ensure that our beliefs in this area are not compromised. Should such dress by opposing teams violate our beliefs in modesty the college would be bound to curtail such opportunities that it now affords its women in athletics. All dress code provisions of the college are subject to such review and change by the board of directors as it sees fit in keeping with our basic and fundamental belief in the teaching of the Bible as it relates to modesty.

The committee is concerned that any loosening of the standard for application of the religious exemption could open a giant loophole and lead to widespread sex discrimination in education.

Small Provider Exception

The bill adds a new subsection (c) to Section 504 of the Rehabilitation Act of 1973. This new subsection specifies that small providers such as pharmacies or grocery stores, are not required to make significant structural alternations to their existing facilities to ensure accessibility to handicapped persons if alternative means of providing the services are available. It also provides that the terms in this subsection must be construed with reference to the regulations existing on the date of the enactment of this subsection.

An important aspect of the regulations is their provision regarding "program accessibility." The regulations of the Department of Health and Human Services, promulgated in 1977, for example, generally provide that qualified handicapped persons shall not be excluded from federally assisted education, health, welfare, or other social service programs merely becomse [sic] of the inaccessibility of a recipient's facilities. The regulations allow for a flexible approach by recipients in making programs accessible to handicapped persons in the most integrated setting. Recipients may, for example, redesign equipment, reassign classes or services to accessible facilities, or assign aides to handicapped persons (*See* 45 C.F.R. 8422(b)). Where other methods of achieving compliance

are ineffective to render programs accessible, a recipient is required to make structural changes in its facilities.

However, in the case of a small health, welfare, or other social service provider, a special last resort "small provider" exception is available under current regulations. It is a limited exception available only to small provider, defined as one with fewer than fifteen employees. If such small providers cannot render their programs accessible by any means other than making significant alterations to their facilities, they may, after consultation with the handicapped person seeking its services, and with no resulting additional obligations to the handicapped person, refer the person to another provider whose facilities are accessible. Before a small provider makes such a referral, it must determine that the other provider's program is, in fact, accessible and that the other provider is willing to provide the services. *See* 45 C.F.R. 84.22(c). The drafters of these regulations believed this "last resort" referral provisions was ap-

[page 24]

propriate" . . . to avoid imposition of additional costs in the health care area, to encourage providers to remain in the Medicaid program, and to avoid imposing significant costs on small, low-budget providers such as day-care centers or foster homes. *See* 45 C.F.R., Pt. 84, App. A, Analysis of Final Regulation.

The regulations of other Federal agencies have similar special provisions for "small providers." *See, e.g.*, Department of Agricultural regulations, 7 C.F.R. 156.16(c); Department of Labor regulations, 28 C.F.R. 32.27(b)(3); Veterans Administration, 38 C.F.R. 18.422(c);

Department of Commerce, 15 C.F.R. 8b.16(c). For example, a "mom and pop" grocery store is such a "small provider."

This new subsection makes it clear that the special rules now contained in the above described regulations are now specifically statutorily authorized and that S. 557 will not entail any new requirements of architectural modification.

Ultimate beneficiaries

Section 7 of the bill sets forth a rule of construction which provides that "ultimate beneficiaries" that were excluded from coverage prior to the enactment of S. 557 would continue to be excluded from coverage after the enactment of the bill. The "lead agency" regulations interpreting Title VI, section 504, and the Age Discrimination Act currently define who is a "recipient" of federal assistance with a proviso excluding from such term the "ultimate beneficiaries" of such federal assistance.

For example, since the first of these civil rights statutes, Title VI, was enacted, farmers receiving crop subsidies have been excluded from coverage because they are "ultimate beneficiaries." On May 5, 1964, during debate in the Senate on the 1964 Civil Rights Act, Senator John Sherman Cooper introduced into the Congressional Record a letter from Attorney General Robert Kennedy answering several questions about Title VI. One of the issues Attorney General Kennedy addressed was the application of Title VI to farmers.

Mr. Kennedy responded as follows:

Question. Would persons who receive payments under various agricultural support and marketing programs be "recipients" under Title VI? If so, what type of discrimination by these "recipients" under Title VI would be grounds for cutting off their participation in a program? Would it include employment practices?

Answer. Farmers who receive federal grants, loans, or assistance contracts would be "recipients" within the meaning of Title VI. Title IV would protect such farmers, themselves, from being denied the benefits of such programs, or otherwise discriminated against under them, on grounds of race, color, or national origin. But, since such programs are basically commodity programs, and since individual farmers are the ultimate beneficiaries of such programs, Title VI would not authorize imposition of any requirements on individual farmers participating in these programs. And, more particularly, it would not authorize imposition of any requirements with respect to farm em-

[page 25]

ployment, since farm employees are not beneficiaries of the program referred to.

So, from the beginning, in the legislative history of Title VI, the model for the other three statutes, we have the unequivocal statement that farmers who receive crop subsidies are not covered.

In testimony before the House on this measure in the 99th Congress, Daniel Marcus, former Deputy General Counsel, HEW and former General Counsel for the

Department of Agriculture confirmed that in practice, farmers who receive crop subsidies are not subject to these laws, although those who participate in recreational programs serving the public cannot discriminate in determining who they will allow on their land.

Mr. Marcus stated:

> Specifically, it has been charged that H.R. 700 would, by broadly defining "program or activity," subject farmers who receive price support payments or loans, social security beneficiaries, and food stamp and welfare recipients to the anti-discrimination provisions of Title VI, Title IX, Section 504, and the Age Discrimination Act.
>
> I believe there is no valid basis for these concerns. The basic language of Title VI and the other anti-discrimination statutes, barring discrimination in programs or activities receiving federal financial assistance, has never been interpreted to reach the activities or actions of ultimate beneficiaries of federally financed programs, such as farmers, social security beneficiaries or welfare recipients. This understanding, which is embodied in a number of agency regulations (e.g., the Department of Agriculture's Title VI regulations, 7 C.F.R. Section 15.2), reflects the basic purpose of those laws. In enacting these laws, Congress was not concerned with regulating the activities of the tens of millions of Americans who are the ultimate beneficiaries of the federal financial assistance, but who in no sense operate a federally-financed program or activity. Rather, Congress was concerned with the state agencies, the educational institutions and others who operate programs or

> conduct activities providing services to others and who are in a position to injure ultimate beneficiaries through discrimination. In other words, ultimate beneficiaries are to a large extent the people intended to be protected by Title VI and the other anti-discrimination statutes, not the people subjected to those statutes.

Other examples of ultimate beneficiaries include persons receiving social security benefits, persons that receive Medicare and Medicaid benefits, and individual recipients of food stamps.

Nothing in S. 557 would prohibit recipients of new forms of federal financial assistance created after enactment of the bill from being exempted from coverage as "ultimate beneficiaries," where the type of aid and the nature of the recipient is analogous to the existing categories of "ultimate beneficiaries."

[page 26]

VII. Summary of Committee Action

The committee met to consider S. 557 on May 7 and May 20, 1987. The committee accepted by unanimous consent two minor technical amendments proposed by Chairman Kennedy and Senator Weicker. The committee defeated six other amendments by roll call votes.

The Kennedy-Weicker amendments clarify that part (1) of the bill's definition of "program or activity" applies only to governmental entities, and that part (4) of the definition, the so-called catch-all provision, applies to entities established by two or more of the entities described in parts (1), (2), or (3).

By a vote of 5-11, the Committee defeated an amendment proposed by Senator Thurmond to delete system-wide coverage for private elementary and secondary schools. This amendment would have permitted schools within a private school system to funnel federal funds to some of its schools while practicing discrimination in other schools. It would have been inconsistent with pre-Grove City system-wide coverage of private school systems under which, for example, four Catholic dioceses in Louisiana submitted school system-wide desegregation plans to HEW in 1969, pursuant to Title VI. And it would have established, for the first time, a different standard of civil rights protection for public and private schools.

By a vote of 5-11, the Committee defeated an anti-abortion amendment to add a new section to Title IX, proposed by Senator Humphrey, as follows:

> Section 909. Nothing in this Title shall be construed to grant or secure or deny any right relating to abortion or the funding thereof, or to require or prohibit any person, or public or private entity or organization, to provide any benefit or service relating to abortion. Nothing in the preceding sentence shall be construed to authorize a penalty to be imposed on any person because such person has had a legal abortion.

The amendment would have made a substantive change in the law, and has no place in a bill which seeks to restore the effect of Title IX and other civil rights statutes to their pre-Grove City interpretation. It relates to the issue of what constitutes discrimination, not the scope of coverage of the civil rights laws. It is not abortion-neutral, as it [sic] sponsor claimed. The amendment

would repeal long-standing Title IX regulations which protect students and employees from abortion-related discrimination in education programs. It would put abortion language in the text of Title IX for the first time. The Title IX regulations are not at issue in this legislation. They have been in place for twelve years, and there have been neither any legal challenges to these regulations by anti-choice groups, nor any effort on the part of this administration to withdraw or modify the regulations. S. 557 neither ratifies nor rejects the Title IX regulations related to discrimination based on pregnancy or termination of pregnancy.

Title IX does not now require any institution to perform abortions and no abortions would be mandated if S. 557 were enacted. This bill does not expand abortion rights. Religiously-controlled or-

[page 27]

ganizations will continue to be able to apply for, and receive, an exemption from Title IX requirement where compliance with those requirements would violate their religious tenets. For example, a religiously controlled university that wished to exclude insurance coverage of abortions from an otherwise comprehensive student health insurance policy, could seek a religious exemption. Additionally, the U.S. Catholic Conference's former general counsel, Wilfred Caron, stand in a legal analysis in 1985 that neither the House nor Senate bill "would create any new abortion rights." (Although the analysis was of a previous version of the bill, it did not differ on this point.) Title IX covers only students and employees, and does not reach the public at large. Therefore, claims that

the bill would require hospitals to provide abortion services to the general public are false.

By a vote of 5-11, the committee rejected an amendment proposed by Senator Hatch to loosen the standard for the religious exemption in Title IX from "controlled by a religious organization" to "closely identified with the tenets of a religious organization." For the reasons discussed in part VII, *supra*, the committee determined that it is unnecessary and unwise to change the standard for the religious tenet exception.

By a vote of 5-11, the committee defeated an amendment proposed by Senator Thurmond that would limit coverage of programs or activities operated by religious organizations to the particular subunit of the organization which receives the federal funds. In other words, this amendment would not overturn the *Grove City College* decision as it applies to programs or activities which receive federal financial assistance, as long as the programs or activities are run by a religious organization. The dual system of civil rights protections for programs carried out by religious and secular organizations contained in this amendment is unprecedented in the history of our civil rights laws. For example, religious employers are subject to Title VII in the same manner as non-religious employers. With the narrow exception of the religious tenet exemption in Title IX, religious recipient of federal financial assistance have been and are subject to the prohibitions on discrimination of the four civil rights laws in the same manner as non-religious recipients of federal aid. There has been no trampling of religious liberty under these laws in the more than twenty years they have been in effect. S. 557 simply will restore the

coverage of these laws to their pre-*Grove City College* scope.

By a vote of 5-11, the committee defeated an amendment by Senator Thurmond to strike institution-wide coverage for corporations, partnerships, and other private organizations principally engaged in the business of providing health care, housing, social services, or parks and recreation. As discussed in section VII, supra, pre-Grove City College practice was corporation-wide coverage for all corporations. The language of S. 557 limits broad coverage to those areas of public services where it is most important.

By a vote of 2-14, the committee rejected an amendment proposed by Senator Humphrey to reverse the decision of the Supreme Court in *School Board of Nassau County* v. *Arline,* that individuals with contagious diseases may be considered handicapped under section 504.

[page 28]

The amendment sought to overturn *Arline,* by stating that individuals with contagious diseases are not considered to be handicapped for purposes of section 504. This amendment would have made substantive change in the law, with no hearings or consideration by the Handicapped Subcommittee.

Furthermore, the amendment represents a complete retreat from the principles for which section 504 stands: protection of handicapped individuals from discrimination based not only on the handicap itself, but from irrational fears and prejudice of others. As the Court

made clear, Congress did not authorize broad exceptions such as contagious diseases from the coverage of the law.

It is also clear that the Court's decision in *Arline* in no way altered the specific language of section 504 that an individual seeking the law's protection be "otherwise qualified." After *Arline* as well as before, public health considerations such as contagion continue to be a factor in determining whether a person is in fact "qualified" to perform a particular job. What the Court said was that an individual with a contagious disease can be considered handicapped, thus affording the person the opportunity to make the case for why he or she is qualified to perform the job. If, after the evaluation of whether the individual constitutes a public health risk, no reasonable accommodation is possible, as the regulations require, then the individual will not be considered "otherwise qualified." The Court specifically noted that fact in a footnote to the *Arline* decision, where it made clear that a person who poses a significant risk of communicating an infectious disease will not be "otherwise qualified" for his job if a reasonable accommodation will not eliminate the risk.

The committee voted to report S. 557 favorably to the full Senate by a vote of 12-4.

Matters Not Affected by the Bill

S. 557 addresses only the scope of coverage under Title VI, Title IX, section 504, and the Age Discrimination Act of recipients of federal financial assistance. The bill does not change in any way who is a recipient of federal financial assistance. For example, Appendix A, Subpart A to the Department of Education Section 504 regulations

addressed the fact that nonpublic elementary and secondary schools did not become recipients by virtue of the fact that their students participate in certain federally funded programs, as follows:

> One comment requested that the regulation specify that nonpublic elementary and secondary schools that are not otherwise recipients do not become recipients by virtue of the fact their students participate in certain federally funded programs. The Secretary believes it unnecessary to amend the regulation in this regard, because almost identical language in the Department's regulations implementing title VI and title IX of the Education Amendments of 1972 has consistently been interpreted so as not to render such schools recipients. These schools, however, are indirectly subject to the substantive requirements of this regulation through the application of section 104.4(b)(iv), which
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> [page 29]
>
> prohibits recipients from assisting agencies that discriminate on the basis of handicap in providing services to beneficiaries of the recipients' programs.

These regulations are unaffected by S. 557.

S. 557 does not alter what is defined as "federal financial assistance." Statements about the definition of federal financial assistance made during consideration of earlier versions of this legislation in the 98th and 99th Congresses, as well as the current version, merely reflect the views of individual members of Congress. Such statements are not relevant to the interpretation of S. 557. Whatever was determined to constitute "federal financial

assistance" as that term applies to Title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975 and Title VI of the Civil Rights Act of 1964, before the enactment of S. 557 will continue to constitute "federal financial assistance" after its enactment.

For example, S. 557 does not overrule or alter the Supreme Court ruling in the case *Department of Transportation* v. *Paralyzed Veterans of America*, 477 U.S. 597[3] (1986), that airline companies are not recipients of federal financial assistance as a result of their use of federally-assisted airports or federal air traffic controllers. However, the committee notes that in some instances, airline companies may, in their own right, be recipients of federal financial assistance. Further, Congress last year unanimously passed the Air Carrier Access Act, (P.L. 99-435) to expressly prohibit discrimination against handicapped individuals by airlines.

Nor does the bill alter in any way the substantive definition of what constitutes discrimination under these statutes.

VIII. Votes in Committee

The vote on the Thurmond amendment to eliminate system-wide coverage of private and secondary schools was as follows:

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[3] 106 S.Ct. 2705, 91 L.Ed. 494.

AYES-5	NAYS-11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Humphrey amendment concerning abortion was as follows:

AYES-5	NAYS-11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd

[page 30]

Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Hatch amendment to expand the religious tenet exception was as follows:

AYES-5	NAYS-11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

The vote on the Thurmond amendment to limit coverage of programs and activities operated by religious organizations was as follows:

AYES-5	NAYS-11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	WEICKER
	KENNEDY

The vote on the Thurmond amendment to strike corporation-wide coverage for corporations engaged in certain activities was as follows:

AYES-5	NAYS-11
Hatch	Pell
Quayle	Metzenbaum
Thurmond	Matsunaga
Cochran	Dodd
Humphrey	Simon
	Harkin
	Adams
	Mikulski
	Stafford
	Weicker
	Kennedy

[page 31]

The vote on the Humphrey amendment to reverse the Arline decision was as follows:

AYES-2	NAYS-14
Thurmond	Pell
Humphrey	Metzenbaum
	Matsunaga
	Dodd
	Simon
	Harkin
	Adams
	Mikulski
	Hatch
	Stafford
	Quayle
	Weicker
	Cochran
	Kennedy

The vote to report the bill favorably with a committee amendment in the nature of a substitute was as follows:

AYES-12	NAYES-4
Pell	Hatch
Metzenbaum	Quayle
Matsunaga	Thurmond
Dodd	Humphrey
Simon	
Harkin	
Adams	
Mikulski	
Stafford	
Weicker	
Cochran	
Kennedy	

IX. Cost Estimate

U.S. Congress,
Congressional Budget Office,
Washington, DC, June 5, 1987.

Hon. Edward M. Kennedy
Chairman, Committee on Labor and Human Resources,
U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has reviewed S. 557, the Civil Rights Restoration Act of 1987, as ordered reported by the Senate Committee on Labor and Human Resources, May 20, 1987. We estimate that the federal government would incur no additional costs and might realize some savings from enacting this bill. State and local governments are not expected to incur any significant direct costs, because we do not expect their nondiscrimination practices to change significantly as a result of this bill.

S. 557 would amend the Education Amendments of 1972, the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and

[page 32]

the Civil Rights Act of 1964. Under current law, and pursuant to the 1984 Supreme Court decision in the *Grove City College v. Bell* case, a program or activity that receives federal financial assistance is required to comply with nondiscrimination policies, but other programs or activities run by the same institution need not comply with these policies. Under the bill, a recipient of federal financial assistance would be required to comply with nondiscrimination policies in all activities.

Enacting S. 557 might result in savings to the federal government. To monitor adherence to nondiscrimination policies under current law, the federal government would have to increase administrative efforts and accounting capabilities to trace the flow of federal financial assistance to individual programs and activities. Enacting S. 557 would avoid these potential costs.

If you wish further details on this estimate, we will be pleased to provide them.

With best wishes,

Sincerely,

EDWARD M. GRAMLICH,
Acting Director.

X. Regulatory Impact Statement

While Senate rules require that statements as to the regulatory, inflationary and paperwork impact of specific legislation be included, the Committee finds that this is impossible in this particular case. S. 557 amends four statutes which prohibit discrimination by recipients of federal financial assistance. Because receipt of federal financial assistance is voluntary and because federal financial assistance programs are constantly changing, it is impossible to predict precisely the number of entities which will be subject to the anti-discrimination requirements of the four statutes. Thus, it is impossible to predict the specific impact the bill will have on regulations, inflation, and paper work.

While specific estimates are impossible, certain assumptions may be made. Since S. 557 creates no new recipients of federal financial assistance, the bill will not alter the number of entities covered by the four anti-discrimination statutes. Since S. 557 spends no new money, the inflationary impact of the bill will be zero. In addition, because S. 557 requires no new regulations, the regulatory impact of the bill should be negligible. The bill requires no new paperwork in addition to that already required under the four statutes amended by S. 557. By eliminating the requirement that federal agencies and private parties trace federal funds within an entity which is extended federal financial assistance prior to initiating a compliance review, investigation of a discrimination complaint, or enforcement action, S. 557 will actually reduce administrative and paperwork burdens.

* * *

[page 37]

XII. MINORITY VIEWS

The controversy over S. 557 does not concern the prohibitions against discrimination found in the four statutes addressed in the legislation. There is no disagreement within the Committee that we should not permit or subsidize discrimination against minorities, women, persons with handicaps or the aged. Nor does the controversy arise over whether the decision of the Supreme Court in *Grove City College v. Bell* should be reversed. We agree on that point as well. What is at issue is whether S. 557, as drafted and interpreted by the majority of the Committee, would interfere with the exercise of some of our most fundamental rights, an ironic consequence for legislation bearing the label "civil rights," and whether the bill will result only in a restoration of the prior scope of federal regulatory jurisdiction.

In some respects, S. 557 is an improvement over prior attempts at *Grove City* corrective legislation. The two amendments to the bill accepted by the Committee helped to clarify some of the jurisdictional definitions in the bill by ameliorating two of the more glaring loopholes found in the initial draft of the legislation. Nonetheless, there are still serious problems with the bill. For example, the legislation does not simply restore the law to what it was the day before the Supreme Court issued the *Grove City* decision. Instead, it represents a marked increase in federal jurisdiction over churches and synagogues, private and religious schools, and the private sector. Similarly, it not only ratifies a federal regulation that makes

the failure to provide abortion services a discriminatory act but would impose this regulation more broadly.

An amendment to make S. 557 abortion neutral was rejected, and amendments to protect the First Amendment rights of religious institutions and churches were also defeated. It is distressing that the majority feels it necessary to limit and infringe some civil rights in the name of others.

The report filed by the majority cannot be adequately or accurately responded to at this time. We were given forty-eight hours to respond to the first version of the report and then given a second version a day later. Given the inaccuracies in the versions of the report given to us, there is insufficient time to prepare a thorough response to the numerous and complex issues involved. A more complete response will be provided later, and individual members of the minority may wish to file separate views.

Consideration of civil rights legislation often is not a calm, dispassionate process. In the past, spirited rhetoric and polemic posturing have often gotten in the way of the traditional debate over the meaning and consequences of legislation. We hope that on the floor, there will be sufficient time to discuss the problems with S. 557 and that the full Senate will choose to correct the problems with the bill. We can prohibit discrimination by those who receive federal financial assistance without jeopardizing other equally important civil rights.

ORRIN G. HATCH.
GORDON J. HUMPHREY
STROM THURMOND.

SCOLARO, SHULMAN, COHEN, LAWLER,
BURSTEIN & FERRARA, P.C.
ATTORNEYS AND COUNSELORS AT LAW
90 PRESIDENTIAL PLAZA
CORNER OF TOWNSEND AND HARRISON STREETS
SYRACUSE, NEW YORK 13202
TELEPHONE (315) 471-8111

FAX (315) 471-1355

[Name Omitted In Printing]

October 26, 1993

United States Department of Education
Office for Civil Rights
Mary E. Switzer Building
330 C Street, S.W.
Washington, DC 20202

Re: Sexual Harassment

Dear Sir or Madam:

We have had questions from a school district client concerning how to draw the line between sexual harassment and other forms of touching. Please advise if the United States Department of Education has any information concerning suggested policies and whether there are any reported cases on the following issues:

1. What constitutes student-to-student sexual harassment at the primary level? Primary age children go through stages of inappropriate behavior, including touching other children. School authorities deal with each situation as it arises, but sometimes parents are offended. Are there legal implications?

2. What should be the school district's limits regarding hugging and other touching of students by staff members? Some staff are concerned that what is a normal adult response to a situation (e.g., helping a child zip up his pants) could be held against them. Are there any written guidelines?

I would appreciate any information which you may have on these issues. Thank you for your assistance with this matter.

Very truly yours,

SCOLARO, SHULMAN, COHEN, LAWLER,
BURSTEIN & FERRARA, P.C.

/s/ Craig M. Atlas
Craig M. Atlas

[SEAL]

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202-___

Mr. Craig M. Atlas
Scolaro, Shulman, Cohen, Lawler,
Burstein & Ferrara, P.C.
90 Presidential Plaza
Corner of Townsend and Harrison Streets
Syracuse, New York 13202

Dear Mr. Atlas:

It is my pleasure to respond to your letter asking for information about sexual harassment in elementary and secondary education. In your letter, you specifically asked if the U.S. Department of Education Office for Civil Rights (OCR), has any information about suggested sexual harassment policies. You also asked whether there were any reported cases (or other information) on the following two issues: student-to-student sexual harassment at the primary education level, and what limits a school district should impose regarding hugging or other touching of students by staff members.

To date, we have found the following Title IX cases on sexual harassment in elementary and secondary education: *Gwinnett v. Franklin County Public Schools*, 112 S.Ct. 1028 (1992); *Patricia H. v. Berkeley Unified School District*, ___ F.Supp. ___, 1993 WL 33510 (N.D. Cal.); and *Doe v. Petaluma City School District*, ___ F.Supp. ___, 1993 WL 359872 (N.D. Cal.).

I have enclosed the only existing OCR policy guidance on sexual harassment. Please note that this document was issued in 1981. While the procedural guidance is still

good, the case law is outdated. This policy is currently under revision, and we are incorporating the issue of sexual harassment in elementary and secondary schools.

As for model sexual harassment policies for elementary and secondary schools, both the American Association of University Women (AAUW) and the National School Boards Association have sample policies. They may be contacted at the following addresses:

AAUW
Program and Policy Department
1111 16th Street, N.W.
Washington, D.C. 20036
(202) 785-7700

National School Boards Association
1680 Duke Street
Alexandria, Virginia 22314
(703) 838-6722

We have not reviewed these policies, and we can not endorse them. However, they may be useful to your client. In addition, if either you or your client are trying to develop such a policy, you should also feel free to contact our regional technical assistance staff at the following address:

Ms. Paula D. Kuebler
Regional Civil Rights Director
Office for Civil Rights, Region II
U.S. Department of Education
26 Federal Plaza, 33rd Floor
Room 33-130, 02-1010
New York, New York 10278-0082

I hope this information is helpful to you.

Sincerely,

/s/ Stacey Rosenberry
Stacey Rosenberry
Attorney Advisor
Elementary and Secondary
Education Policy Division
Office for Civil Rights

Attachment
As stated

MEMORANDUM

UNITED STATES DEPARTMENT OF EDUCATION
WASHINGTON, D.C. 20202

DATE: AUG 31 1981

TO: Regional Civil Rights Directors
Regions I-X

THRU: Michael A. Middleton
/s/ Michael A. Middleton
Deputy Assistant Secretary
for Civil Rights

FROM: Antonio J. Califa
/s/ Illegible
Director for Litigation,
Enforcement and Policy Service

SUBJECT: Title IX and Sexual Harassment Complaints

I. Introduction

The purpose of this memorandum is to explain the application of Title IX to sexual harassment, to provide some

guidance for investigating complaints on this issue and to establish interim procedures for handling sexual harassment complaints. It is also to request that you encourage your staff to share case experience and recommendations on this subject with headquarters staff.

OCR regional offices have received and investigated a relatively small number of complaints concerning sexual harassment. We reviewed a number of these cases in preparing this memorandum and benefited greatly from the experience, research and opinions of regional investigators and attorneys who have worked on this type of case. It appears that OCR is receiving an increasing number of complaints concerning sexual harassment. Moreover, we have received numerous inquiries on this from representatives of recipient institutions and other interested parties.

II. Title IX Jurisdiction over Sexual Harassment

OCR's jurisdiction over sexual harassment is based on the fact that such conduct constitutes differential treatment on the basis of sex. Accordingly, our basis jurisdiction is established by section 106.31(b) of the Title IX regulation which provides in relevant part:

> *Specific prohibitions.* Except as provided in this subpart, in providing any aid, benefit, or service to a student, a recipient shall not, on the basis of sex:
>
> (1) Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;

(2) Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;

(3) Deny any person any such aid, benefit, or service;

(4) Subject any person to separate or different rules of behavior, sanctions, or other treatment;

* * *

(8) Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.

Accordingly, we have adopted the following working definition of sexual harassment:

> Sexual harassment consists of verbal or physical conduct of a sexual nature, imposed on the basis of sex, by an employee or agent of a recipient that denies, limits, provides different, or conditions the provision of aid, benefits, services or treatment protected under Title IX.

III. Investigation Procedures

Investigations of complaints of sexual harassment in the context of a possible Title IX violation will generally focus on a substantive determination, a procedural determination or both. These determinations, as discussed below, are: 1) Has the complaining party been subject to sexual harassment in the provision of, the denial of, or the enjoyment of any aid, benefit, service or treatment in violation of section 106.31(b) (or any other section) of the Title IX regulation; and 2) Have the requirements of section 106.8 of the Title IX regulation been met by the recipient?

A. Substantive Determination

1. Has the complaining party been subject to sexual harassment in the provision of, the denial of, or the enjoyment of any aid, benefit, service or treatment in violation of section 106.31(b) (or any other section) of the regulation?

   a. If the facts alleged are true, would they constitute sexual harassment?

      (1) Is the person who allegedly sexually harassed the complainant an employee or an agent of a recipient institution?

      (2) Does the complaint allege that the person who sexually harassed the complainant engaged in verbal or physical conduct of a sexual nature, imposed on the basis of sex, that would condition, deny, limit, or differentiate any aid, benefits, services or treatment protected under Title IX?

   b. Did sexual harassment occur?

      (1) Was there verbal or physical conduct of a sexual nature by an employee or an agent of a recipient institution?

      (2) Was the verbal or physical conduct of a sexual nature imposed on the basis of the sex of the complainant?

      (3) Was the provision of an aid, benefit, service or treatment protected under Title IX:

a. denied in connection with the imposition of such verbal or physical conduct;

b. limited in connection with the imposition of such verbal or physical conduct;

c. provided differently in connection with the imposition of such verbal or physical conduct; or

d. conditioned upon the acceptance of such verbal or physical conduct?

The investigation should include a review of the institution's factual determination of the complaint, if a report or a statement of findings is available.

Proving sexual harassment frequently is difficult because investigations of complaints often result in evidence that consists solely of one person's word against another's. A determination of sexual harassment should be based on the facts of the case; inconclusive evidence would result in a no cause finding. Determining whether there are additional complaints of sexual harassment against the same person may help to corroborate the complainant's allegation. If additional complainants or witnesses who allege that they have experienced similar treatment from the same person are identified, there is still a problem as to corroboration if there were no witnesses as to the additional claimed incident(s). However, the weight of the numbers of individuals who come forward to corroborate can be persuasive.

Sexual harassment is distinct from acceptable friendly behavior; however, on occasion the line between acceptable and unacceptable behavior may prove difficult to recognize. In some cases the actions or words of a person against whom a complaint is filed may have been misinterpreted by the complainant. In recognizing such a situation you should be aware that misunderstandings between individuals may result from culturally based differences in standards of appropriate behavior. Examples of where different standards may lead to miscommunication are maintaining eye contact, standing closely, or touching another person's arm or shoulder. Determination of whether certain actions or words constitute sexual harassment should be made with an awareness of First Amendment protections for free expression and academic freedom. These protections are not absolute. They can be limited by the degree to which the protected speech or activity encroaches upon the protected rights of others. If there is a question as to whether a certain action or statement constitutes sexual harassment, we recommend that you apply to the facts of the case the standard of behavior of a reasonable person in a similar circumstance. As to actions over which reasonable people might differ, if a request to stop is made known there is an expectation that the offensive behavior should cease or be modified. You should be aware of acts of perceived sexual harassment that are not sufficient to raise a Title IX violation. For example, a teaching assistant who asks one

of his students for a date and is refused and makes no further overtures would not be guilty of sexual harassment.

A tangible discriminatory effect (e.g., a denial of or the provision of different or limited aid, benefits or services based on sex) can lend support to a complaint of sexual harassment. For example, a student alleges Professor X offered an "A" in exchange for sexual favors, and the student refused. A determination that the student received a "C" grade for an "A" quality paper would help corroborate the student's claim. Examples of other types of evidence that might be used to demonstrate a discriminatory effect include the fact that, following the incident complained of, the student was given inappropriate academic assignments, was given less access to faculty assistance, failed to receive a warranted research appointment, received unjustifiably poor recommendations, failed to receive job referrals, received less financial aid than he/she was entitled to receive, was given a poor office or desk assignment, or any other reprisal.

Investigations of complaints of sexual harassment involve inquiries into interpersonal relations, professional ethics and behavior and academic judgment. These investigations can affect the careers of both individuals involved as well as the institution's reputation. The possibility for legal actions involving defamation issues exists. Consequently, the investigation should be

conducted with sensitivity and an awareness of these considerations.

2. Discussion

It is possible, depending on the benefit, aid, treatment or service involved, that other provisions of the Title IX regulation may provide additional jurisdiction. For example, if a situation involved a financial aid administrator who conditioned the award of financial aid on a student's acceptance of physical conduct of a sexual nature, section 106.37(a) would provide specific jurisdiction.

The denial, limitation or change in any aid, benefit or service as a result of acts of sexual harassment is covered under subparagraphs (2), (3) and (8) of section 106.31(b). However, an actual denial, limitation or change in an aid, benefit or service is not essential because in any case in which acts of sexual harassment constitute differential treatment on the basis of sex, the acts themselves may constitute violations of subparagraphs (1), (2) in part, (4) and (8) of section 106.31(b). For example, a professor could offer a student an "A" grade on a paper in exchange for sexual favors. The student refuses and the professor awards the student a "B" grade, the appropriate grade in this case. Notwithstanding the difficulty of proving the actual sexual harassment, the student has been treated differently on the basis of sex in violation of the Title IX statute.

The only Title IX case addressing this point is *Price v. Yale*, No. 77-277 (D. Conn. July 2, 1979), *aff'd sub. nom. Alexander v. Yale*, 63

F.2d 178 (2nd Cir. 1980). Pamela Price claimed to be sexually harassed by her professor. She alleged that she received a diminished grade on a paper and a final grade in the course which was lower than she deserved because she refused to respond to the professor's sexual overtures. On page 3 of the unpublished opinion (attached at Tab A) the court stated:

On the basis of all the evidence the court finds that the alleged incident of sexual proposition did not occur and that the grade of "C" which Miss Price received on the paper submitted to Professor Duvall and the grade of "C" which she received in his course did not reflect consideration of any factor other than academic achievement.

In an accompanying footnote the court attempted to clarify:

This court does not accept the proposition pressed by defendant that the correctness of the grade received in a case where sexual harassment is proved would itself be dispositive of a claim of discrimination.

If a plaintiff shows a term or condition has been imposed in a sexually discriminatory fashion she will have stated a claim. Cf. *Tomkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977), sex discrimination in employment. Proof that the grade is correct in such a case would not mean the student had not suffered educational detriment. Her performance might be adversely affected by emotional trauma or she might forego other courses taught by the offending instructor despite their importance to her education plans. *Price* at page 2, footnote 3.

The holding that mere treatment in a sexually discriminatory fashion is sufficient to constitute sexual

harassment has been more definitively expressed in a recent Title VII employment case. The Court of Appeals for the District of Columbia held that an employer violates Title VII merely by subjecting an employee to sexual harassment, even if the employee's resistance to the harassment does not cause the employer to deprive the employee of any tangible job benefits. *Bundy v. Jackson*, 24 FEP 1155, No. 79-1693 (D.C. Cir., January 12, 1981). A copy of *Bundy* is attached at Tab B. We believe that this principle is equally applicable to situations that involve students.

The Title IX regulation covers acts of sexual harassment, as defined above, that are directed at students. Inasmuch as we do not yet have a conclusive determination on the validity of Subpart E of our Title IX regulation, complaints by employees of sexual harassment under Title IX should be dealt with in the same manner in which Title IX employment complaints are handled. Establishing a nexus will be difficult in this type of case because sexual harassment usually occurs in the context of private interactions between two parties.

Any employee attempting to file this type of complaint should be advised to contact the EEOC. The EEOC amended its *Guidelines on Discrimination Because of Sex* to include the issue of sexual harassment and published the guidelines in final form on November 10, 1980. A copy of these guidelines is attached at Tab C.

In some situations, a recipient may be liable under Title IX for the sexual harassment acts of one student perpetrated upon another student under an agent/principal theory. Under the law of agency, where the institution has delegated some responsibility to a student to act in an authoritative position with

respect to another student, the institution is responsible for the acts of that student acting in the delegated capacity. For example, a recipient would be responsible for the sexual harassment acts of a graduate student acting in the capacity of a teaching assistant. This graduate student with delegated authority would be in a position of power over a student in his or her class. Should the teaching assistant sexually harass a student, the recipient institution would have responsibility under Title IX for those acts.

B. Procedural Determination

1. Have the requirements of section 106.8 of the Title IX regulation been met by the recipient?

   a. Are there established and published grievance procedures that encompass complaints of sexual harassment?

   b. Do the procedures provide for prompt and equitable resolution of complaints of sexual harassment?

   c. Were these procedures available to and used by the complainant? (Please note that a complainant is not required to use the grievance procedure.)

   Inasmuch as the Title IX regulation provides protection against acts of sexual harassment, recipients are required to have available grievance procedures called for by section 106.8 for allegations of sexual harassment. Section 106.8 of the Title IX regulation requires that the recipient designate an employee to coordinate its responsibilities under Title IX, including the investigation of any allegations of violation of Title IX. This section also requires that the recipient notify

students and employees of that individual's name, address and telephone number and that the recipient adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part.

The investigation should determine how the recipient institution responded procedurally to the complaint of sexual harassment and whether the grievance procedure, if used, provided for a prompt and equitable resolution. We are aware that OCR has not issued standards defining the requirements of prompt and equitable resolution. If an investigation raises questions you are unable to answer, as to how to evaluate whether a grievance procedure is prompt or equitable, please forward this issue with your recommendation to headquarters for policy guidance.

2. Discussion

Institutions may choose to investigate and resolve sexual harassment complaints that would constitute a violation of Title IX under their general grievance procedures. However, a number of institutions have adopted specific sexual harassment grievance procedures. Examples of these specific grievance procedures are attached at Tab D. Their reasons for adopting separate grievance procedures are that allegations of sexual harassment frequently raise sensitive issues and require a degree of confidentiality. If the identity of the complainant and/or the respondent and the allegations

themselves were made public prior to any determination, serious problems for the individuals involved, as well as for the institution, could result. They feel these factors create situations that call for a different procedure from that used for other complaints. Accordingly, although we recognize that it is permissible for an institution to operate a grievance procedure that differs from the standard grievance procedure in that it may, at least during the early stages of proceedings, protect the identity of the parties, we note that any Title IX grievance procedure must meet the prompt and equitable standard called for in the regulation.

IV. Unresolved Issues

There are two unresolved issues we wish to call to your attention. We seek your comments and recommendations on these issues.

A. Notice Requirement

OCR has authority under 34 CFR 106.9(a) to require that institutions notify all administrators, faculty, and students that sexual harassment of students or applicants for admission is a violation of Title IX and that it is the policy of the university not to discriminate on the basis of sex in the educational programs or activities that it operates. OCR has not exercised this authority.

We seek comments based upon your experience with complainants and institutions as to whether OCR should take any action to expand the general notice requirement under Title IX to encompass a specific sexual harassment notice requirement. We also seek your comments as to

whether OCR should take any actions that would put institutions on notice that Title IX covers sexual harassment. For example, an informational letter to institution presidents could be developed.

B. Effect of Preventive Measures by Recipient

In a line of Title VII cases employers were held responsible for the acts of sexual harassment by its agents and employees. This liability was based in part on the doctrine of *respondeat superior* or agency, by which an employer is liable for the discriminatory acts of its supervisory personnel, [*Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977); *Williams v. Saxbe*, 413 F. Supp. 654 (D.D.C. 1976)]. Employers are able to minimize liability through preventive measures, which include the following actions:

(1) raising affirmatively the subject of sexual harassment within the institution and making clear that sexual harassment is against university policy,

(2) establishing a responsive complaint mechanism whereby harassed individuals may have their complaints resolved, and

(3) taking effective steps to correct any harassment, including warning and appropriately disciplining the offending individual. [*Tompkins v. Public Service Electric & Gas Co.*, 568 F.2d 1044 (3rd Cir. 1977), 15 EPD #7954, partially reversing 422 F. Supp. 533 (D.N.J. 1976), 12 EPD #11,267; *Munford v. James O. Barnes & Co.*, 441 F. Supp. 449 (E.D.

Mich. 1979); *Barnes v. Costle*, 561 F.2d 983 (D.C. Cir. 1977)].

The EEOC *Guidelines on Discrimination Because of Sex* recommend at 29 CFR 1064.11(f):

> Prevention is the best tool for the elimination of sexual harassment. An employer should take all steps necessary to prevent sexual harassment from occurring, such as affirmatively raising the subject, expressing strong disapproval, developing appropriate sanctions, informing employees of their right to raise and how to raise the issue of harassment under Title VII, and developing methods to sensitize all concerned.

We seek your comments as to whether the Title VII theory of minimizing liability through preventive measures could be applied to educational institutions under Title IX. We ask that you consider whether such a theory could be legally applicable and, if so, whether the application of this theory would be beneficial or contrary to the interests of beneficiaries protected by Title IX.

C. Sexual Harassment of Students by Other Students

The other unresolved issue relates to a recipient's responsibility for the sexual harassment acts of students against fellow students in the context of the situation in which neither student is in a position of authority, derived from the institution, over the other student(s). The liability of a recipient institution for the sexual harassment acts of one student perpetrated upon another student where one student is acting as an agent of the recipient and is in a

position of authority over the other student has been discussed.

A theory upon which a more expansive institutional liability would be placed is premised on a Title VII case, *Kyriazi v. Western Electric Co.*, 461 F. Supp. 894 (D. New Jersey 1978). Liability was premised on the theory that co-workers and supervisors had interfered with the employment relationship to the degree that the work environment was not free from sex discrimination. We seek your opinion of the application of this theory to Title IX and equal educational opportunity as it relates to sexual harassment acts of one student to another.

V. Instructions and Comments

This memorandum outlines OCR's basic interpretation of Title IX with respect to sexual harassment. Based on our interaction with regional staff, we believe that this policy is already being applied correctly in the types of cases described in this memorandum. However, in the event that you receive a complaint regarding sexual harassment that would raise questions related to academic freedom, or any complex or unresolved issues, please forward to headquarters for approval prior to initiating an investigation, a copy of the complaint the proposed investigative plan and a memorandum identifying outstanding policy issues, as well as your advice on these issues. These documents should be sent to Burton M. Taylor, Acting Director, Division of Postsecondary Education. In addition, compliance reviews should not include inquiries about sexual harassment. Any review of grievance procedures should determine whether grievance procedures are available to persons protected under Title IX who

wish to have the institution resolve sexual harassment complaints.

We are seeking your advice on the unresolved issues and on investigation of complaints of sexual harassment in general. Please forward your comments and information copies of all sexual harassment cases to Jean Peelen, Acting Chief, Legal Standards and Policy Development Branch, Division of Postsecondary Education. If you have questions, please call Jean Peelen or Jeanette Lim, Attorney, Legal Standards and Policy Development Branch, 245-0261. We would appreciate your comments within three weeks from the date of this memorandum.

Attachments

TAB A – *Price v. Yale*

TAB B – *Bundy v. Jackson*

TAB C – EEOC *Guidelines on Discrimination Because of Sex*

TAB D – Examples of grievance procedures

[Federal Register: March 13, 1997 (Volume 62, Number 49)]
[Notices]
[**Page** 12033-12051]
From the Federal Register Online via GPO Access [wais.access.gpo.gov]
[DOCID:fr13mr97-166]

[[**Page** 12033]]

Part VII

Department of Education

Office of Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties; Notice

[[**Page 12034**]]

DEPARTMENT OF EDUCATION

Office for Civil Rights; Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties

ACTION: Final policy guidance.

SUMMARY: The Assistant Secretary for Civil Rights issues a final document entitled "Sexual Harassment Guidance" (Guidance). Sexual harassment of students is prohibited by Title IX of the Education Amendments of 1972 under the circumstances described in the Guidance. The Guidance provides educational institutions with information regarding the standards that are used by the Office for Civil Rights (OCR), and that institutions should

use, to investigate and resolve allegations of sexual harassment of students engaged in by school employees, other students (peers), or third parties.

FOR FURTHER INFORMATION CONTACT: Howard I. Kallem. U.S. Department of Education, 600 Independence Avenue, S.W., Room 5412 Switzer Building, Washington, D.C. 20202-1174. Telephone (202) 205-9641. Internet address: Howard___Kallem@ed.gov For additional copies of this Guidance, individuals may call OCR's Customer Service Team at (202) 205-5413 or toll-free at 1-800-421-3481. Individuals who use a telecommunications device for the deaf (TDD) may call the Department's toll-free number, 1-800-421-3481, in conjunction with the phone company's TDD relay capabilities. This Guidance will also be available at OCR's site on the Internet at URL http:// www.ed.gov/offices/OCR/ocrpubs.html.

SUPPLEMENTARY INFORMATION:

Purpose of the Guidance

Title IX of the Education Amendments of 1972 (Title IX) prohibits discrimination on the basis of sex in education programs and activities receiving Federal financial assistance. Sexual harassment of students can be a form of discrimination prohibited by Title IX. The Office for Civil Rights has long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX. OCR's policy and practice is consistent with the Congress' goal in enacting Title IX – the elimination of sex-based discrimination in federally assisted education programs. It is also

consistent with United States Supreme Court precedent and well-established legal principles that have developed under Title IX, as well as under the related anti-discrimination provisions of Title VI and Title VII of the Civil Rights Act of 1964.

The elimination of sexual harassment of students in federally assisted educational programs is a high priority for OCR. Through its enforcement of Title IX, OCR has learned that a significant number of students, both male and female, have experienced sexual harassment, that sexual harassment can interfere with a student's academic performance and emotional and physical well-being, and that preventing and remedying sexual harassment in schools is essential to ensure nondiscriminatory, safe environments in which students can learn.

The Guidance applies to students at every level of education. It provides information intended to enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence. In addition, the Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students. The Guidance is important because school personnel who understand their obligations under Title IX are in the best position to prevent harassment and to lessen the harm to students if, despite their best efforts, harassment occurs. The Guidance discusses factors to be considered in applying the standards and examples that are designed to illustrate how the standards may apply to particular situations. Overall, the Guidance illustrates that in addressing allegations of sexual harassment, the judgment and common sense of teachers and school

administrators are important elements of a response that meets the requirements of Title IX.

In addition, it is clear from the Guidance that not all behavior with sexual connotations constitutes sexual harassment under Federal law. In order to give rise to a complaint under Title IX, sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment. For a one-time incident to rise to the level of harassment, it must be severe.

As illustrated in the Guidance, school personnel should consider the age and maturity of students when responding to allegations of sexual harassment. The Guidance explains that age is relevant in determining whether sexual harassment occurred in the first instance, as well as in determining the appropriate response by the school. For example, age is relevant in determining whether a student welcomed the conduct and in determining whether the conduct was severe, persistent, or pervasive. Age is a factor to be considered by school personnel when determining what type of education or training to provide to students in order to prevent sexual harassment from occurring.

Notably, during the time that the Guidance was available for public comment, several incidents involving young students occurred in public schools and were widely reported in the press. In one incident a school reportedly punished a six-year-old boy, under its sexual harassment policy, for kissing a female classmate on the cheek. These incidents provide a good example of how

the Guidance can assist schools in formulating appropriate responses to conduct of this type. The factors in the Guidance confirm that a kiss on the cheek by a first grader does not constitute sexual harassment.

Consistent with the Guidance's reliance on school employees and officials to use their judgment and common sense, the Guidance offers school personnel flexibility in how to respond to sexual harassment. Commenters who read the Guidance as always requiring schools to punish alleged harassment under an explicit sexual harassment policy rather than by use of a general disciplinary or behavior code, even if the latter may provide more age-appropriate ways to handle those incidents, are incorrect. First, if inappropriate conduct does not rise to the level of harassment prohibited by Title IX, school employees or officials may rely entirely on their own judgment regarding how best to handle the situation.

Even if a school determines that a student's conduct is sexual harassment, the Guidance explicitly states that Title IX permits the use of a general student disciplinary procedure. The critical issue under Title IX is whether responsive action that a school could reasonably be expected to take is effective in ending the sexual harassment and in preventing its recurrence. If treating sexual harassment merely as inappropriate behavior is not effective in ending the harassment or in preventing it from escalating, schools must take additional steps to ensure that students know that the conduct is prohibited sex discrimination.

Process in Developing the Guidance

Because of the importance of eliminating sexual harassment in schools, and based on the requests of schools, teachers, parents, and other interested parties, OCR determined that it should provide to schools a comprehensive discussion of the legal standards and related issues involved in resolving sexual harassment incidents. While this document reflects longstanding OCR policy and practice in this area, it also reflects extensive consultation with interested parties. Even before making documents available for formal comment, OCR held a series of meetings with groups representing students, teachers, school administrators, and researchers. In these discussions, OCR gained valuable information regarding the realities of sexual harassment in schools, as well as information regarding promising practices for identifying and preventing harassment. These insights and learning are reflected in the Guidance.

Issuance of the Guidance for Comment and the Format of the Final Guidance

On August 16, 1996, the Assistant Secretary for Civil Rights published a notice in the Federal Register (61 FR 42728) regarding the availability of a document entitled: "Sexual Harassment Guidance: Peer Sexual Harassment" (Peer Guidance) and inviting comments on the document. Subsequently, on October 4, 1996, the Assistant Secretary published in the Federal Register (61 FR 52172) a request for comments on a document entitled: "Sexual Harassment Guidance: Harassment of Students by School Employees" (Employee Guidance). Both notices stated

that the guidance documents reflected longstanding OCR policy and practice and invited comments and recommendations regarding their clarity and completeness.

The most significant change in the format of the final document is that it combines the two separate guidance documents into one document that addresses sexual harassment of students by peers, school employees, or third parties. Commenters frequently stated that a combined document would be clearer and easier to use. OCR agrees. Thus, the term "Guidance" when used in this preamble refers to the combined document that incorporates both the Peer Guidance and the Employee Guidance.

Analysis of Comments and Changes

In response to the Assistant Secretary's invitations to comment, OCR received approximately 70 comments on the Peer Guidance and approximately 10 comments on the Employee Guidance. Many commenters stated that the guidance documents provided comprehensive, clear, and useful information to schools. For instance, one commenter stated that the Peer Guidance was "a godsend * * * in one convenient place [it provides] the clear implications of the statutes, regulations, and case law." Another commenter stated that the Guidance "will assist universities * * * in maintaining a harassment-free educational environment."

Commenters also provided many specific suggestions and examples regarding how the final Guidance

could be more complete and clearer. Many of these suggested changes have been incorporated into the Guidance.

The preamble discusses recurring and significant recommendations regarding the clarity and completeness of the document. While the invitations to comment on the Peer Guidance and Employee Guidance did not request substantive comments regarding OCR's longstanding policy and practice in the area of sexual harassment, some commenters did provide these comments. In instances in which OCR could provide additional useful information to readers related to these comments, it has done so in the preamble. Comments are grouped by subject and are discussed in the following sections.

The Need for Additional Guidance

Comments: Many commenters agreed that a document combining the Peer Guidance and the Employee Guidance would provide more clarity to schools. Commenters disagreed, however, regarding whether, and what type of, additional information is needed to enhance schools' understanding of their legal obligations under Title IX. Some commenters asked for more detailed analysis regarding the applicable legal standards, including hard and fast rules for determining what is harassment and how a school should respond. Other commenters, by contrast, found OCR's guidance documents, including the extensive legal citations, to be too detailed and "legalistic." They expressed a need for a document that is simpler and more accessible to teachers, parents, school administrators, and others who need to

know how to recognize, report, or respond to sexual harassment.

Discussion: As the Guidance makes clear, it is impossible to provide hard and fast rules applicable to all instances of sexual harassment. Instead, the Guidance provides factors to help schools make appropriate judgments.

In response to concerns for more analysis of the legal standards, OCR has provided additional examples in the Guidance to illustrate how the Title IX legal standards may apply in particular cases. It is important to remember that examples are just that; they do not cover all the types of situations that may arise. Moreover, they may not illustrate the only way to respond to sexual harassment of students because there is often no one right way to respond.

OCR also believes that there is a legitimate concern that school administrators, teachers, students, and parents need an accessible document to assist them in recognizing and appropriately responding to sexual harassment. Accordingly, OCR has developed, in addition to the final Guidance, a pamphlet for conveying basic information regarding parties' rights and responsibilities under Title IX. The pamphlet includes information from the Guidance that would be most useful to these groups as they confront issues of sexual harassment. Concurrent with the issuance of this Guidance, the pamphlet will be issued with copies available from all OCR offices and an electronic posting on OCR's web site. For a copy of the pamphlet, individuals may call OCR's Customer Service Team at (202) 205-5413 or toll-free 1-800-421-3481. Copies

will also be available from all OCR enforcement offices, and the pamphlet will be posted on OCR's site on the Internet at URL http://www.ed.gov/offices/OCR/ocrpubs.html.

Additional Guidance on the First Amendment

Comments: Many commenters asked OCR to provide additional guidance regarding the interplay of academic freedom and free speech rights with Title IX's prohibition of sexual harassment. Several of these commenters wanted OCR to announce hard and fast rules in this area, although commenters disagreed on what those rules should be. For instance, one commenter requested that OCR tell schools that the First Amendment does not prevent schools from punishing speech that has no legitimate pedagogical purpose. Another commenter, by contrast, wanted OCR to state that classroom speech simply can never be the basis for a sexual harassment complaint. Other commenters requested that OCR include specific examples regarding the application of free speech rights.

Discussion: As the documents published for comment indicated, the resolution of cases involving potential First Amendment issues is highly fact-and context-dependent. Thus, hard and fast rules are not appropriate.

However, in order to respond to concerns that schools need assistance in making these determinations, OCR has provided additional examples in the Guidance regarding the application of the First Amendment principles discussed there.

Application of Guidance to Harassment by Third Parties

Comments: Several commenters stated that it was unclear whether the Guidance applies if a student alleges harassment by a third party, i.e., by someone who is not an employee or student at the school.

Discussion: The Guidance clarifies that the principles in the Guidance apply to situations in which, for example, a student alleges that harassment by a visiting professional speaker or members of a visiting athletic team created a sexually hostile environment. The Peer Guidance did, in fact, discuss the standards applicable to the latter situation in which students from another school harassed the school's students.

The applicable standards have not changed, but the final Guidance clarifies that the same standards also apply if adults who are not employees or agents of the school engage in harassment of students.

Application of Guidance to Harassment Based on Sexual Orientation

Comments: Several commenters indicated that, in light of OCR's stated policy that Title IX's prohibition against sexual harassment applies regardless of the sex of the harassed student or of the sex of the alleged harasser, the Guidance was confusing regarding the statement that Title IX does not apply to discrimination on the basis of sexual orientation.

Discussion: The Guidance has been clarified to indicate that if harassment is based on conduct of a sexual nature, it may be sexual harassment prohibited by Title IX

even if the harasser and the harassed are the same sex or the victim of harassment is gay or lesbian. If, for example, harassing conduct of a sexual nature is directed at gay or lesbian students, it may create a sexually hostile environment and may constitute a violation of Title IX in the same way that it may for heterosexual students. The Guidance provides examples to illustrate the difference between this type of conduct, which may be prohibited by Title IX, and conduct constituting discrimination on the basis of sexual orientation, which is not prohibited by Title IX. The Guidance also indicates that some State or local laws or other Federal authority may prohibit discrimination on the basis of sexual orientation.

The Effect on the Guidance of Conflicting Federal Court Decisions

Comments: Several commenters requested clarification of the standards to be applied to sexual harassment cases in States subject to the jurisdiction of the United States Court of Appeals for the Fifth Circuit, specifically in light of the Fifth Circuit's decision in *Rowinsky v. Bryan Independent School District*, 80 F.3d 1006 (5th Cir. 1996), cert. denied, 117 S. Ct. 165 (1996).

Discussion: One beneficial result of the Guidance will be to provide courts with ready access to the standards used by the agency that has been given the authority by law to interpret and enforce Title IX. Courts generally benefit from and defer to the expertise of an agency with that authority.

Nevertheless, OCR recognizes that recent Fifth Circuit decisions add to schools' confusion regarding Title IX

legal standards. In *Rowinsky*, the Fifth Circuit held that a school is not liable under Title IX even if it is on notice of peer sexual harassment and it ignores or fails to remedy it, unless it responds differently based on the sex of the alleged victim. Consistent with the vigorous dissent in *Rowinsky*, as well as with other Federal decisions contrary to the *Rowinsky* holding, OCR continues to believe that the *Rowinsky* decision was wrongly decided. In OCR's view, the holding in *Rowinsky* was based on a mistaken belief that the legal principle underpinning this aspect of the Guidance makes a school responsible for the actions of a harassing student, rather than for the school's own discrimination in failing to respond once it knows that the harassment is happening.

In two very recent decisions involving sexual harassment of students by school employees, the Fifth Circuit again applied Title IX law in a manner inconsistent with OCR's longstanding policy and practice. First, in *Canutillo Indep. School Dist. v. Leija*, 101 F.3d 393, 398-400 (5th Cir. 1996), the court held, again over a strong dissent and contrary to OCR policy, that a school district was not liable for the sexual molestation of a second grade student by one of her teachers because the student and her mother only reported the harassment to her homeroom teacher. The court determined that notice to the teacher was not notice to the school – notwithstanding that a school handbook instructed students and parents to report complaints to the child's primary or homeroom teacher.

Finally, in *Rosa H. v. San Elizario Indep. School Dist.*, 1997 U.S. App. LEXIS 2780 (Feb. 17, 1997), the Fifth Circuit reversed a jury finding that a school district was

liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student, often during the school day. The court held that, while "there was no question that the student was subject to discrimination based on sex," a school is liable only in situations in which an employee who has been invested by the school board with supervisory power over the offending employee actually knew of the abuse, had the power to end the abuse, and failed to do so.

Several of the decisions discuss according "appreciable deference" to OCR's interpretation of Title IX in appropriate circumstances and contain other indications that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law, even if it is inconsistent with OCR policy. OCR will also participate where appropriate, and in conjunction with the Department of Justice, to shape the evolution of Title IX law in a manner consistent with the Guidance.

Inconsistent decisions do not prohibit schools in States in the Fifth Circuit from following the Guidance. Since the Guidance assists school in ensuring that students can learn in a safe and nondiscriminatory educational environment, it is the better practice for these schools to follow the Guidance. Indeed, in light of the evolving case law in the Fifth Circuit, following the Guidance may also be the safest way to ensure compliance with the requirements of Title IX. School personnel in

States in the Fifth Circuit should also consider whether State, local, or other Federal authority affects their obligations in these areas.

Notice

Comments: Several commenters recommended that additional guidance be provided regarding the types of employees through which a school can receive notice of sexual harassment. Commenters disagreed, however, on who should be able to receive notice. For instance, some commenters stated that OCR should find that a school has received notice only if "managerial" employees, "designated" employees, or employees with the authority to correct the harassment receive notice of the harassment. Another commenter suggested, by contrast, that any school employee should be considered a responsible employee for purposes of notice.

Discussion: The Guidance states that a school has actual notice of sexual harassment if an agent or responsible employee of the school receives notice. An exhaustive list of employees would be inappropriate, however, because whether an employee is an agent or responsible school employee, or whether it would be reasonable for a student to believe the employee is an agent or responsible employee, even if the employee is not, will vary depending on factors such as the authority actually given to the employee and the age of the student. Thus, the Guidance gives examples of the types of employees that can receive notice of harassment. In this regard, it is important for schools to recognize that the Guidance does not necessarily require that any employee who receives notice of

the harassment also be responsible for taking appropriate steps to end the harassment or prevent its recurrence. An employee may be required only to report the harassment to other school officials who have the responsibility to take appropriate action.

OCR does not agree with those commenters who recommend that a school can receive notice only through managerial or designated employees. For example, young students may not understand those designations and may reasonably believe that an adult, such as a teacher or the school nurse, is a person they can and should tell about incidents of sexual harassment regardless of that person's formal status in the school administration.

Comments: Several commenters stated that constructive notice, or the "should have known" standard, puts schools in the untenable position of constantly monitoring students and employees to seek out potential harassers.

Discussion: Constructive notice is relevant only if a school's liability depends on notice and conduct has occurred that is sufficient to trigger the school's obligation to respond. As the examples in the Guidance indicate, constructive notice is applicable only if a school ignores or fails to recognize overt or obvious problems of sexual harassment. Constructive notice does not require a school to predict aberrant behavior.

Remedying the Effects of Harassment on Students

Comments: Several commenters expressed concern regarding the Guidance's statement that schools may be

required to pay for professional counseling and other services necessary to remedy the effects of harassment on students. Some comments indicated confusion over the circumstances under which the responsibility for those costs would exist and concern over the financial responsibility that would be created. Others stated that schools should not be liable for these costs if they have taken appropriate responsive action to eliminate the harassing environment, or if the harassers are non-employees.

Discussion: The final Guidance provides additional clarification regarding when a school may be required to remedy the effects on those who have been subject to harassment. For instance, if a teacher engages in quid pro quo harassment against a student, a school is liable under Title IX for the conduct and its effects. Thus, appropriate corrective action could include providing counseling services to the harassed student or paying other costs necessary to remedy the effects of the teacher's harassment. On the other hand, if a school's liability depends on its failure to take appropriate action after it receives notice of the harassment, *e.g.*, in cases of peer harassment, the extent of a school's liability for remedying the effects of harassment will depend on the speed and efficacy of the school's response once it receives notice. For instance, if a school responds immediately and appropriately to eliminate harassment of which it has notice and to prevent its recurrence, it will not be responsible for remedying the effects of harassment, if any, on the individual. By contrast, if a school ignores complaints by a student that he or she is persistently being sexually harassed by another student in his or her class, the school will be required to remedy those effects of the harassment that it could have

prevented if it had responded appropriately to the student's complaints, including, if appropriate, the provision of counseling services.

Confidentiality

Comments: Many commenters recommended additional clarification regarding how schools should respond if a harassed student requests that his or her name not be disclosed. Some commenters believe that, particularly in the elementary and secondary school arena, remedying harassment must be the school's first priority, even if that action results in a breach of a request for confidentiality. These commenters were concerned that, by honoring requests for confidentiality, schools would not be able to take effective action to remedy harassment. Other commenters believe that if requests for confidentiality are not honored, students may be discouraged from reporting harassment. These commenters, therefore, argue that declining to honor these requests would be less effective in preventing harassment than taking whatever steps are possible to remedy harassment, while maintaining a victim's confidentiality. Finally, some commenters were concerned that withholding the name of the victim of harassment would interfere with the due process rights of the accused.

Discussion: The Guidance strikes a balance regarding the issue of confidentiality: encouraging students to report harassment, even if students wish to maintain confidentiality, but not placing schools in an untenable position regarding their obligations to remedy and prevent further harassment, or making it impossible for an

accused to adequately defend himself or herself. The Guidance encourages schools to honor a student's request that his or her name be withheld, if this can be done consistently with the school's obligation to remedy the harassment and take steps to prevent further harassment. (The Guidance also notes that schools should consider whether the Family Educational Rights and Privacy Act (FERPA) would prohibit a school from disclosing information from a student's education record without the consent of the student alleging harassment.) In addition, OCR has provided clarification by describing factors schools should consider in making these determinations. These factors include the nature of the harassment, the age of the students involved, and the number of incidents and students involved. These factors also may be relevant in balancing a victim's need for confidentiality against the rights of an accused harasser.

The Guidance also has been clarified to acknowledge that, because of the sensitive nature of incidents of harassment, it is important to limit or prevent public disclosure of the names of both the student who alleges harassment and the name of the alleged harasser. The Guidance informs schools that, in all cases, they should make every effort to prevent public disclosure of the names of all parties involved, except to the extent necessary to carry out a thorough investigation.

FERPA

Comments: Several commenters stated that the Department should change its position that FERPA could prevent a school from informing a complainant of the

sanction or discipline imposed on a student found guilty of harassment. Some commenters argued that information regarding the outcome of a sexual harassment complaint is not an education record covered by FERPA. Other commenters argued alternatively that any information regarding the outcome of the proceedings is "related to" the complainant and, therefore, the information can be disclosed to him or her consistent with FERPA. In addition, some commenters asked for clarification that FERPA does not limit the due process rights of a teacher who is accused of harassment to be informed of the name of the student who has alleged harassment.

Discussion: As these comments indicate, the interplay of FERPA and Title IX raises complex and difficult issues. Regarding requests for clarification on the interplay of FERPA and the rights of an accused employee, the Guidance clarifies that the Department does not interpret FERPA to override any federally protected due process rights of a school employee accused of harassment.

Regarding whether FERPA prohibits the disclosure of any disciplinary action taken against a student found guilty of harassment, it is the Department's current position that FERPA prohibits a school from releasing information to a complainant if that information is contained in the other student's education record unless – (1) the information directly relates to the complainant (for example, an order requiring the student harasser not to have contact with the complainant); or (2) the harassment involves a crime of violence or a sex offense in a postsecondary institution. However, in light of the comments received on this issue, the Department has determined that its position regarding the application of FERPA to

records and information related to sexual harassment needs further consideration. Accordingly, the section on "Notice of Outcome and FERPA" has been removed from the Guidance. Additional guidance on FERPA will be forthcoming.

Does Title IX Require Schools to Have a Sexual Harassment Policy

Comments: Several commenters requested additional clarity regarding whether Title IX requires schools to have a policy explicitly prohibiting sexual harassment or to have grievance procedures specifically intended to handle sexual harassment complaints, or both.

Discussion: Title IX requires a recipient of Federal funds to notify students and parents of elementary and secondary students of its policy against discrimination based on sex and have in place a prompt and equitable procedure for resolving sex discrimination complaints. Sexual harassment can be a form of sexual discrimination. The Guidance clearly states that, while a recipient's policy and procedure must meet all procedural requirements of Title IX and apply to sexual harassment, a school does not have to have a policy and procedure specifically addressing sexual harassment, as long as its non-discrimination policy and procedures for handling discrimination complaints are effective in eliminating all types of sex discrimination. OCR has found that policies and procedures specifically designed to address sexual harassment, if age appropriate, are a very effective means of making students and employees aware of what constitutes sexual harassment, that that conduct is prohibited

sex discrimination, and that it will not be tolerated by the school. That awareness, in turn, can be a key element in preventing sexual harassment.

Dated: March 10, 1997.

Norma V. Cantu,
Assistant Secretary for Civil Rights.

Sexual Harassment Guidance: Harassment of Students[1] by School Employees, Other Students, or Third Parties

Summary of Contents

Introduction
Applicability of Title IX
Liability of a School for Sexual Harassment
Welcomeness
Severe, Persistent, or Pervasive
Notice
Recipient's Response
Prompt and Equitable Grievance Procedures
First Amendment

Introduction

Under Title IX of the Education Amendments of 1972 (Title IX) and its implementing regulations, no individual

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[1] This Guidance does not address sexual harassment of employees, although that conduct may be prohibited by Title IX. If employees bring sexual harassment claims under Title IX, case law applicable to sexual harassment in the workplace under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-2(a), and Equal Employment Opportunity Commission (EEOC) guidelines will apply. *See* 28 CFR 42.604 (Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance).

may be discriminated against on the basis of sex in any education program or activity receiving Federal financial assistance.[2] Sexual harassment of students is a form of

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[2] 20 U.S.C. 1681 et seq., *as amended*; 34 CFR 106.1, 106.31(a)(b). In analyzing sexual harassment claims, the Department also applies, as appropriate to the educational context, many of the legal principles applicable to sexual harassment in the workplace developed under Title VII. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 75 (1992) (applying Title VII principles in determining that a student was entitled to protection from sexual harassment by a teacher in school under Title IX); *Kinman v. Omaha Public School Dist.*, 94 F.3d 463, 469 (8th Cir. 1996) (applying Title VII principles in determining that a student was entitled to protection from hostile environment sexual harassment by a teacher in school under Title IX); *Doe v. Claiborne County*, 1996 WL 734583, *19 (6th Cir. December 26, 1996) (holding in a case involving allegations of hostile environment sexual harassment of a student by a teacher that Title VII agency principles apply to sexual harassment cases brought under Title IX); *Murray v. New York University College of Dentistry*, 57 F.3d 243, 249 (2nd Cir. 1995) (while finding notice lacking, court applied Title VII principles in assuming a Title IX cause of action for sexual harassment of a medical student by a patient visiting the school clinic); *Doe v. Petaluma City School Dist.*, 830 F.Supp. 1560, 1571-72 (N.D. Cal. 1993) (applying Title VII principles in determining that if school had notice of peer sexual harassment and failed to take appropriate corrective action, school liable under Title IX), *rev'd in part on other grounds*, 54 F.3d 1447 (9th Cir. 1995); *Kadiki v. Virginia Commonwealth University*, 892 F.Supp. 746, 749 (E.D. Va. 1995) (in Title IX case involving allegations of both quid pro quo and hostile environment sexual harassment, court indicated that Title VII standards should be applied).

In addition, many of the principles applicable to racial harassment under Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d et seq., and Title VII also apply to sexual harassment under Title IX. Indeed, Title IX was modeled on Title VI, *Cannon v. University of Chicago*, 441 U.S. 677, 694 (1979). For

prohibited sex discrimination[3] under the circumstances described in the Guidance. The following types of conduct constitute sexual harassment:

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information on racial harassment, *see the Department's Notice of Investigative Guidance for Racial Harassment*, 59 FR 11448 (1994).

[3] Consistent with Supreme Court decisions, *see Franklin*, 503 U.S. at 75 (expressly ruling that the sexual harassment of a student by a teacher violates Title IX), the Department has interpreted Title IX as prohibiting sexual harassment for over a decade. *Kinman*, 94 F.3d at 469 (Title IX prohibits hostile environment sexual harassment of student by teacher). Moreover, it has been OCR's longstanding practice to apply Title IX to peer harassment. *See also Bosley v. Kearney R-1 School Dist.*, 904 F.Supp. 1006, 1023 (W.D. Mo. 1995); *Doe v. Petaluma City School Dist.*, Plaintiff's Motion for Reconsideration Granted, 1996 WL 432298 (N.D. Cal. July 22, 1996) (reaffirming Title IX liability for peer harassment if the school knows of the hostile environment but fails to take remedial action); *Burrow v. Postville Community School District*, 929 F.Supp. 1193, 1205 (N.D. Iowa 1996) (student may bring Title IX cause of action against a school for its knowing failure to take appropriate remedial action in response to the hostile environment created by students at the school); *Oona R.-S. v. Santa Rosa City Schools*, 890 F.Supp. 1452 (N.D. Cal. 1995); *Davis v. Monroe County Bd. of Education*, 74 F.3d 1186, 1193 (11th Cir. 1996) (as Title VII is violated if a sexually hostile working environment is created by co-workers and tolerated by the employer, Title IX is violated if a sexually hostile educational environment is created by a fellow student or students and the supervising authorities knowingly failed to act to eliminate the harassment), *vacated, reh'g granted*, 91 F.3d 1418 (11th Cir. 1996); *cf. Murray*, 57 F.3d at 249 (while court finds no notice to school, assumes a Title IX cause of action for sexual harassment of a medical student by a patient visiting school clinic). *But see* note 27. Of course, OCR has interpreted Title IX as prohibiting quid pro quo harassment of students for many years. *See Alexander v. Yale University*, 459 F.Supp. 1, 4 (D.Conn. 1977), *aff'd*, 631 F.2d 178 (2nd Cir. 1980).

Quid Pro Quo Harassment

A school employee[4] explicitly or implicitly conditions a student's participation in an education program or activity or bases an educational decision on the student's submission to unwelcome sexual advances, requests for sexual favors, or other verbal, nonverbal, or physical conduct of a sexual nature.[5] Quid pro quo harassment is equally unlawful whether the student resists and suffers

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[4] The term "employee" refers to employees and agents of a school. This includes persons with whom the school contracts to provide services for the school. *See Brown v. Hot, Sexy, and Safer Productions, Inc.*, 68 F.3d 525 (1st Cir. 1995) (Title IX sexual harassment claim brought for school's role in permitting contract consultant hired by it to create allegedly hostile environment).

In addition, while the standards applicable to peer sexual harassment are generally applicable to claims of student-on-student harassment, schools will be liable for the sexual harassment of one student by another student under the standards applicable to employee-on-student harassment if a student engages in sexual harassment as an agent or employee of a school. For instance, a school would be liable under the standards applicable to quid pro quo harassment if a student teaching assistant, who has been given the authority to assign grades, requires a student in his or her class to submit to sexual advances in order to obtain a certain grade in the class.

[5] *Alexander*, 459 F.Supp. at 4 (a claim that academic advancement was conditioned upon submission to sexual demands constitutes a claim of sex discrimination in education); *Kadiki*, 892 F.Supp. at 752 (reexamination in a course conditioned on college student's agreeing to be spanked should she not attain a certain grade may constitute quid pro quo harassment); *see also Karibian v. Columbia University*, 14 F.3d 773, 777-79 (2nd Cir. 1994) (Title VII case).

the threatened harm or submits and thus avoids the threatened harm.

Hostile Environment Sexual Harassment

Sexually harassing conduct (which can include unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature)[6] by an employee, by another student, or by

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[6] *See e.g., Franklin*, 503 U.S. at 63 (conduct of a sexual nature found to support a sexual harassment claim under Title IX included kissing, sexual intercourse); *Meritor Savings Bank FSB v. Vinson*, 477 U.S. 57, 60-61 (1986) (demands for sexual favors, sexual advances, fondling, indecent exposure, sexual intercourse, rape sufficient to raise hostile environment claim under Title VII); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 114 S.Ct. 367 (1993) (sexually derogatory comments and innuendo may support a sexual harassment claim under Title VII); *Ellison v. Brady*, 924 F.2d 872, 873-74, 880 (9th Cir. 1991) (allegations sufficient to state a sexual harassment claim under Title VII included repeated requests for dates, letters making explicit references to sex and describing the harasser's feelings for plaintiff); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 903-4 (1st Cir. 1988) (sexually derogatory comments, posting of sexually explicit drawing of plaintiff, sexual advances may support sexual harassment claim); *Kadiki*, 892 F.Supp. at 751 (professor's spanking of a university student may constitute sexual conduct under Title IX); *Doe v. Petaluma*, 830 F.Supp. at 1564-65 (sexually derogatory taunts and innuendo can be the basis of a harassment claim); *Denver School Dist. #1*, OCR Case No. 08-92-1007 (same as to allegations of vulgar language and obscenities, pictures of nude women on office walls and desks, unwelcome touching, sexually offensive jokes, bribery to perform sexual acts, indecent exposure); *Nashoba Regional High School*, OCR Case No. 01-92-1377 (same as to year-long campaign of derogatory, sexually explicit graffiti and remarks directed at one student.)

a third party that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.[7]

Schools are required by the Title IX regulations to have grievance procedures through which students can complain of alleged sex discrimination, including sexual harassment.[8] As outlined in this guidance, grievance procedures also provide schools with an excellent mechanism to be used in their efforts to prevent sexual harassment before it occurs.

Finally, if the alleged harassment involves issues of speech or expression, a school's obligations may be affected by the application of First Amendment principles.

These and other issues are discussed in more detail in the following paragraphs.

Applicability of Title IX

Title IX applies to all public and private educational institutions that receive Federal funds, including elementary and secondary schools, school districts, proprietary schools, colleges, and universities. The Guidance uses the

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[7] *Davis*, 74 F.3d at 1194, *vacated, reh'g granted; Doe v. Petaluma*, 830 F.Supp. at 1571-73; *Moire v. Temple University School of Medicine*, 613 F.Supp. 1360, 1366 (E.D. Pa. 1985), *aff'd mem.*, 800 F.2d 1136 (3d Cir. 1986); *see also Vinson*, 477 U.S. at 67; *Lipsett*, 864 F.2d at 901; *Racial Harassment Guidance*, 59 FR 11449-50. *But see* note 27.

[8] 34 CFR 106.8(b).

term "schools" to refer to all those institutions. The "education program or activity" of a school includes all of the school's operations.[9] This means that Title IX protects students in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.

It is important to recognize that Title IX's prohibition of sexual harassment does not extend to legitimate nonsexual touching or other nonsexual conduct. For example, a high school athletic coach hugging a student who made a goal or a kindergarten teacher's consoling hug for a child with a skinned knee will not be considered sexual harassment.[10] Similarly, one student's demonstration of a sports maneuver or technique requiring contact with another student will not be considered sexual harassment. However, in some circumstances, nonsexual conduct may take on sexual connotations and may rise to the level of sexual harassment. For example, a teacher's

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[9] 20 U.S.C. 1687 (codification of Title IX portion of the Civil Rights Restoration Act of 1987).

[10] *See also Shoreline School Dist.*, OCR Case No. 10-92-1002 (a teacher's patting student on arm, shoulder, and back, and restraining the student when he was out of control, not conduct of a sexual nature); *Dartmouth Public Schools*, OCR Case No. 01-90-1058 (same as to contact between high school coach and students); *San Francisco State University*, OCR Case No. 09-94-2038 (same as to faculty advisor placing her arm around graduate student's shoulder in posing for a picture); *Analy Union High School Dist.*, OCR Case No. 09-92-1249 (same as to drama instructor who put his arms around both male and female students who confided in him.)

repeatedly hugging and putting his or her arms around students under inappropriate circumstances could create a hostile environment.

Title IX protects any "person" from sex discrimination; accordingly both male and female students are protected from sexual harassment engaged in by a school's employees, other students, or third parties.[11] Moreover, Title IX prohibits sexual harassment regardless of the sex of the harasser, i.e., even if the harasser and the person being harassed are members of the same sex.[12] An

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[11] *Cf. John Does 1 v. Covington County School Bd.*, 884 F.Supp. 462, 464-65 (M.D. Ala. 1995) (male students alleging that teacher sexually harassed and abused them stated cause of action under Title IX).

[12] Title IX and the regulations implementing it prohibit discrimination "on the basis of sex;" they do not restrict sexual harassment to those circumstances in which the harasser only harasses members of the opposite sex in incidents involving either quid pro quo or hostile environment sexual harassment. *See* 34 CFR 106.31. In order for hostile environment harassment to be actionable under Title IX, it must create a hostile or abusive environment. This can occur when a student or employee harasses a member of the same sex. *See Kinman*, 94 F.3d at 468 (female student's alleging sexual harassment by female teacher sufficient to raise a claim under Title IX); *Doe v. Petaluma*, 830 F.Supp. at 1564-65, 1575 (female junior high school student alleging sexual harassment by other students, including both boys and girls, sufficient to raise claim under Title IX); *John Does 1*, 884 F.Supp. at 465 (same as to male students' allegations of sexual harassment and abuse by male teacher.) It can also occur in certain situations if the harassment is directed at students of both sexes. *Chiapuzo v. BLT Operating Co.*, 826 F.Supp. 1334 (D. Wyo. 1993) (court found that such harassment could violate Title VII).

In many circumstances, harassing conduct will be on the basis of sex because the student would not have been subjected

example would be a campaign of sexually explicit graffiti directed at a particular girl by other girls.[13]

Although Title IX does not prohibit discrimination on the basis of sexual orientation,[14] sexual harassment

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to it at all had he or she been a member of the opposite sex; e.g., if a female student is repeatedly propositioned by a male student or employee (or, for that matter, if a male student is repeatedly propositioned by a male student or employee). In other circumstances, harassing conduct will be on the basis of sex if the student would not have been affected by it in the same way or to the same extent had he or she been a member of the opposite sex; *e.g.*, pornography and sexually explicit jokes in a mostly male shop class are likely to affect the few girls in the class more than it will most of the boys.

In yet other circumstances, the conduct will be on the basis of sex in that the student's sex was a factor in or affected the nature of the harasser's conduct or both. Thus, in *Chiapuzo*, a supervisor made demeaning remarks to both partners of a married couple working for him, *e.g.*, as to sexual acts he wanted to engage in with the wife and how he would be a better lover than the husband. In both cases, according to the court, the remarks were gender-driven in that they were made with an intent to demean each member of the couple because of his or her respective sex. *See also Steiner v. Showboat Operating Co.*, 25 F.3d 1459, 1463-64 (9th Cir. 1994), *cert. denied*, 115 S.Ct. 733 (1995) (Title VII case).

[13] *Nashoba Regional High School*, OCR Case No. 01-92-1397. In *Conejo Valley School Dist.*, OCR Case No. 09-93-1305, female students allegedly taunted another female student about engaging in sexual activity; OCR found that the alleged comments were sexually explicit and, if true, would be sufficiently severe, persistent, and pervasive to create a hostile environment.

[14] *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69 (8th Cir. 1989, cert. denied 493 U.S. 1089 (1990) (Title VII case); *DeSantis v. Pacific Tel. & Tel. Co., Inc.*, 608 F.2d 327 (9th Cir. 1979) (same); *Blum v. Gulf Oil Corp.*, 597 F.2d 936 (5th Cir. 1979) (same).

directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX. For example, if students heckle another student with comments based on the student's sexual orientation (*e.g.*, "gay students are not welcome at this table in the cafeteria"), but their actions or language do not involve sexual conduct, their actions would not be sexual harassment covered by Title IX. On the other hand, harassing conduct of a sexual nature directed toward gay or lesbian students (*e.g.*, if a male student or a group of male students target a lesbian student for physical sexual advances) may create a sexually hostile environment and, therefore, may be prohibited by Title IX. It should be noted that some State and local laws may prohibit discrimination on the basis of sexual orientation. Also, under certain circumstances, courts may permit redress for harassment on the basis of sexual orientation under other Federal legal authority.[15]

It is also important to recognize that gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex, but not involving conduct of a sexual nature, may be a form of sex discrimination that violates Title IX if it is sufficiently severe, persistent, or pervasive and directed

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[15] *See Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996) (holding that a gay student could maintain claims alleging discrimination based on both gender and sexual orientation under the Equal Protection Clause of the United States Constitution in case in which school district officials allegedly failed to protect the student to the same extent that other students were protected from harassment and harm by other students due to the student's gender and sexual orientation).

at individuals because of their sex.[16] For example, the repeated sabotaging of female graduate students' laboratory experiments by male students in the class could be the basis of a violation of Title IX. Although a comprehensive discussion of gender-based harassment is beyond the scope of this Guidance, in assessing all related circumstances to determine whether a hostile environment exists, incidents of gender-based harassment combined with incidents of sexual harassment could create a hostile environment, even if neither the gender-based harassment alone nor the sexual harassment alone would be sufficient to do so.[17]

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[16] *See Vinson*, 477 U.S. at 65-66; *Harris*, 114 S.Ct. at 370-371; *see also Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1416 (10th Cir. 1987) (Title VII case); *McKinney v. Dole*, 765 F.2d 1129, 1138 (D.C. Cir. 1985) (Title VII case; physical, but non-sexual, assault could be sex-based harassment if shown to be unequal treatment that would not have taken place but for the employee's sex); *Cline v. General Electric Capital Auto Lease, Inc.*, 757 F.Supp. 923 (N.D. Ill. 1991) (Title VII case).

[17] *See Harris*, 114 S.Ct. at 370-371; *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1485-86 (3rd Cir. 1990) (Title VII case; court directed trial court to consider sexual conduct as well as theft of female employees' files and work, destruction of property, and anonymous phone calls in determining if there had been sex discrimination); *see also Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (Title VII case); *Hicks*, 833 F.2d at 1415; *Eden Prairie Schools, Dist. #272*, OCR Case No. 05-92-1174 (the boys made lewd comments about male anatomy and tormented the girls by pretending to stab them with rubber knives; while the stabbing was not sexual conduct, it was directed at them because of their sex, i.e., because they were girls.

Liability of a School for Sexual Harassment

Liability of a School for Sexual Harassment by its Employees

A school's liability for sexual harassment by its employees is determined by application of agency principles,[18] i.e., by principles governing the delegation of authority to or authorization of another person to act on one's behalf.

Accordingly, a school will always be liable for even one instance of quid pro quo harassment by a school employee in a position of authority, such as a teacher or administrator, whether or not it knew, should have known, or approved of the harassment at issue.[19] Under

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[18] The Supreme Court has ruled that agency principles apply in determining an employer's liability under Title VII for the harassment of its employees by supervisors. *See Vinson*, 477 U.S. at 72. These principles would govern in Title IX cases involving employees who are harassed by their supervisors. *See* 28 CFR 42.604 (regulations providing for handling employment discrimination complaints by Federal agencies; requiring agencies to apply Title VII law if applicable). These same principles should govern the liability of educational institutions under Title IX for the harassment of students by teachers and other school employees in positions of authority. *See Franklin*, 503 U.S. at 75.

[19] The Supreme Court in *Vinson* did not alter the standard developed in the lower Federal courts whereby an institution is absolutely liable for quid pro quo sexual harassment whether or not it knew, should have known, or approved of the harassment at issue. 477 U.S. at 70-71; *see also Lipsett*, 864 F.2d at 901; EEOC Notice N-915-050, March 1990, Policy Guidance on Current Issues of Sexual Harassment, at p. 21. This standard applies in the school context as well. *Kadiki*, 892 F.Supp. at 752 (for the purposes of quid pro quo harassment of a student, professor is in similar position as workplace supervisor).

agency principles, if a teacher or other employee uses the authority he or she is given (*e.g.*, to assign grades) to force a student to submit to sexual demands, the employee "stands in the shoes" of the school and the school will be responsible for the use of its authority by the employee or agent.[20]

A school will also be liable for hostile environment sexual harassment by its employees,[21] i.e., for harassment that is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program or to create a hostile or abusive educational environment if the employee – (1) acted with apparent authority (i.e., because of the school's conduct, the employee reasonably appears to be acting on behalf of the school, whether or not the employee acted with authority);[22] or (2) was aided in carrying out the sexual harassment of students by his or her position of authority with the institution.[23] For example, a school will be liable

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[20] *Kadiki*, 892 F.Supp. at 754-755; *cf. Martin v. Cavalier Hotel Corp.*, 48 F.3d 1343, 1351 n.3 (4th Cir. 1995) (Title VII case); *Karibian*, 14 F.3d at 777-78; *Henson v. City of Dundee*, 682 F.2d 897, 910 (11th Cir. 1982) (Title VII case).

[21] *See* note 4.

[22] Restatement (Second) Agency Sec. 219(2)(d); *Martin*, 48 F.3d at 1352 (finding an employer liable under Title VII for sexual harassment of an employee in case in which the Manager used his apparent authority to commit the harassment; the Manager was delegated full authority to hire, fire, promote, and discipline employees and used the authority to accomplish the harassment; and company policy required employees to report harassment to the Manager with no other grievance process made available to them).

[23] *See* Restatement (Second) of Agency Sec. 219(2)(d); EEOC Policy Guidance on Current Issues of Sexual Harassment at p.

if a teacher abuses his or her delegated authority over a student to create a hostile environment, such as if the teacher implicitly threatens to fail a student unless the student responds to his or her sexual advances, even though the teacher fails to carry out the threat.[24]

28; *Karibian*, 14 F.3d at 780; *Hirschfeld v. New Mexico Corrections Dept.*, 916 F.2d 572, 579 (10th Cir. 1990) (Title VII case); *Martin*, 48 F.3d at 1352. *But see Rosa H v. San Elizario Ind. School Dist.*, 1997 U.S. App. LEXIS 2780 (5th Cir. Feb. 17, 1997). In *San Elizario* the Fifth Circuit reversed a jury finding that a school district was liable under Title IX for a hostile environment created by the school's male karate instructor, who repeatedly initiated sexual intercourse with a fifteen-year-old female karate student. The court held, contrary to OCR policy, that a school could not be found liable under Title IX pursuant to agency principles.

However, language in this and previous decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. In light of the evolving case law in the Fifth Circuit, adhering to the standards in the Guidance may be the best way for schools in these States to ensure compliance with the requirements of Title IX. School personnel should also consider whether State, local, or other Federal authority affects their obligations in these areas.

[24] *Karibian*, 14 F.3d at 780 (employer would be liable for hostile environment harassment in case in which allegations were that a supervisor coerced employee into a sexual relationship by, among other things, telling her she " 'owed him' for all he was doing for her as her supervisor"); *Sparks v. Pilot Freight Carriers, Inc.*, 830 F.2d 1554, 1558-60 (11th Cir. 1987) (Title VII case holding employer liable for sexually hostile environment created by supervisor who repeatedly reminded the harassed employee that he could fire her if she did not comply with his sexual advances).

As this example illustrates, in many cases the line between quid pro quo and hostile environment discrimination will be blurred, and the employee's conduct may constitute both types of harassment. However, what is important is that the school is liable for that conduct under application of agency principles, regardless of whether it is labeled as quid pro quo or hostile environment harassment.

Whether other employees, such as a janitor or cafeteria worker, are in positions of authority in relation to students – or whether it would be reasonable for the student to believe the employees are, even if the employees are not (i.e., apparent authority) – will depend on factors such as the authority actually given to the employee[25] (*e.g.*, in some elementary schools, a cafeteria worker may have authority to impose discipline) and the age of the student. For example, in some cases the younger a student is, the more likely it is that he or she will consider any adult employee to be in a position of authority.

Even in situations not involving (i) quid pro quo harassment, (ii) creation of a hostile environment through an employee's apparent authority, or (iii) creation of a hostile environment in which the employee is aided in carrying out the sexual harassment by his or her position of authority, a school will be liable for sexual harassment of its students by its employees under the same standards applicable to peer and third party hostile environment sexual harassment, as discussed in the next section. That

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[25] *Cf. Karibian*, 14 F.3d at 780.

is, if the school fails to take immediate and appropriate steps to remedy known harassment, then the school will be liable under Title IX.[26] It is important to emphasize that under this standard of liability the school can avoid violating Title IX if it takes immediate and appropriate action upon notice of the harassment.

Liability of a School for Peer or Third Party Harassment[27]

In contrast to the variety of situations in which a school may be liable for sexual harassment by its

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[26] *Id.*

[27] The overwhelming majority of courts that have considered the issue of sexually hostile environments caused by peers have indicated that schools may be liable under Title IX for their knowing failure to take appropriate actions to remedy the hostile environment. *See* note 7 and peer hostile environment cases cited in note 3. However, one Federal Circuit Court of Appeals decision, *Rowinsky v. Bryan Independent School Dist.*, 80 F.3d 1006 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996), has held to the contrary. In that case, over a strong dissent, the court rejected the authority of other Federal courts and OCR's longstanding construction of Title IX and held that a school district is not liable under Title IX for peer harassment unless "the school district itself directly discriminated based on sex," *i.e.*, the school responded differently to sexual harassment or similar claims of girls versus boys. For cases specifically rejecting the *Rowinsky* interpretation, *see e.g.*, *Doe v. Petaluma*, Plaintiff's Motion for Reconsideration Granted, 1996 WL 432298 *6 (N.D. Cal. 1996); *Burrow v. Postville Community School Dist.*, 929 F.Supp. at 1193.

OCR believes that the *Rowinsky* decision misinterprets Title IX. As explained in this Guidance, Title IX does not make a school responsible for the actions of the harassing student, but rather for its own discrimination in failing to take immediate and appropriate steps to remedy the hostile environment once a

employees, a school will be liable under Title IX if its students sexually harass other students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[28] (Each of these factors is discussed in detail in subsequent sections of the Guidance.) Under these circumstances, a school's failure to

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school official knows about it. If a student is sexually harassed by a fellow student, and a school official knows about it, but does not stop it, the school is permitting an atmosphere of sexual discrimination to permeate the educational program. The school is liable for its own action, or lack of action, in response to this discrimination. Notably, Title VII cases that hold that employers are responsible for remedying hostile environment harassment of one worker by a co-worker apply this same standard. *See, e.g., Ellison v. Brady*, 924 F.2d at 881-82; *Hall v. Gus Construction Co.*, 842 F.2d 1010 (8th Cir. 1988); *Hunter v. Allis-Chalmers Corp.*, 797 F.2d 1417 (7th Cir. 1986); *Snell v. Suffolk*, 782 F.2d 1094 (2nd Cir. 1986); *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486 (M.D. Fla. 1991).

Language in subsequent decisions indicates that Title IX law is evolving in the Fifth Circuit. When OCR investigates complaints involving schools in States in the Fifth Circuit (Texas, Louisiana, and Mississippi), it will in each case determine and follow the current applicable law. However, the existence of Fifth Circuit decisions that are inconsistent with OCR policy does not prohibit schools in these States from following the Guidance. In order to ensure students a safe and nondiscriminatory educational environment, the better practice is for these schools to follow the Guidance. Thus, schools should take prompt corrective action to address peer harassment of which they knew or should have known. Indeed, following the Guidance may be the safest way for schools in these States to ensure compliance with the requirements of Title IX.

[28] *See* Restatement (Second) of Agency Sec. 219(2)(b).

respond to the existence of a hostile environment within its own programs or activities permits an atmosphere of sexual discrimination to permeate the educational program and results in discrimination prohibited by Title IX. Conversely, if, upon notice of hostile environment harassment, a school takes immediate and appropriate steps to remedy the hostile environment, the school has avoided violating Title IX. Thus, Title IX does not make a school responsible for the actions of harassing students, but rather for its own discrimination in failing to remedy it once the school has notice.

Sexually harassing conduct of third parties, who are not themselves employees or students at the school (*e.g.*, a visiting speaker or members of a visiting athletic club) can also cause a sexually hostile environment in school programs or activities. For the same reason that a school will be liable under Title IX for a hostile environment caused by its students, a school will be liable if third parties sexually harass its students if (i) a hostile environment exists in the school's programs or activities, (ii) the school knows or should have known of the harassment, and (iii) the school fails to take immediate and appropriate corrective action.[29] However, the type of appropriate

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[29] As with peer harassment by its own students, a school's liability for the harassment of its students by third parties is based on its obligation to provide an environment free of discrimination. *Murray*, 57 F.3d at 250 (student participating in university dental clinic providing services to the public alleged harassment by a patient; while the court ruled in defendant's favor because of lack of notice, it considered such a claim actionable under Title IX); *Racial Harassment Investigative Guidance*, 59 FR 11450 (referring to harassment by neighborhood

steps the school should take will differ depending on the level of control the school has over the third party harasser.[30] This issue is discussed in "Recipient's Response."

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teenagers, guest speaker, and parents). *See, e.g.*, 29 CFR 1604.11(e); *Sparks v. Regional Medical Ctr.*, 792 F.Supp. 735, 738 n.1 (N.D. Ala. 1992) (Title VII case); *Powell v. Las Vegas Hilton Corp.*, 841 F.Supp. 1024, 1027-28 (D. Nev. 1992) (Title VII case); *Magnuson v. Peak Technical Servs., Inc.*, 808 F.Supp. 500, 512-13 (E.D. Va. 1992) (Title VII case); *EEOC v. Sage Realty Corp.*, 507 F.Supp. 599, 611 (S.D.N.Y. 1981) (Title VII case); *cf. Dornhecker v. Malibu Grand Prix Corp.*, 828 F.2d 307 (5th Cir. 1987) (assuming Title VII required employer to respond appropriately to sexual harassment of an employee by a contractor, but finding employer's response sufficient). *See also* Restatement (Second) of Agency Sec. 219(2)(b).

[30] For example, if athletes from a visiting team harass the home school's students, the home school may not be able to discipline the athletes. However, it could encourage the other school to take appropriate action to prevent further incidents; if necessary, the home school may choose not to invite the other school back. *Cf. Danna v. New York Telephone Co.*, 752 F.Supp. 594, 611 (S.D.N.Y. 1990) (telephone company in violation of Title VII for not taking sufficient action to protect its own employee from sexually explicit graffiti at the airport where she was assigned to work, *e.g.*, contacting airport management to see what remedial measures could be taken).

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

[Address Omitted In Printing]

[LOGO]

May 5, 1989

Mr. Charles Cadman
Superintendent
Petaluma City (Elementary) School District
Petaluma High School District
11 Fifth Street
Petaluma, California 94952

(In reply, please refer to Docket Number 09-89-1050.)

Dear Superintendent Cadman:

The Office for Civil Rights (OCR) has completed its investigation of the complaint filed against the Petaluma City (Elementary) School District and the Petaluma High School District (hereinafter District) alleging discrimination on the basis of sex. Specifically, the complainants, Mr. and Mrs. [ ]*[1] alleged that the District discriminated against their daughter [ ], by failing to stop a group of boys from sexually harassing her.

OCR is responsible for enforcing Title IX of the Education Act of 1973, which prohibits discrimination on the basis of sex in any education program or activity receiving Federal financial assistance. During the period of time applicable to the complaint, the 1987-88 school year, the District received Federal monies which create jurisdiction over the recipient. Because of the receipt of these funds,

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*Name of student and family have been omitted in printing and are indicated by [ ].

the District is subject to the requirements of Title IX and to the Departmental regulation implementing Title IX found at 34 C.F.R. Part 106.

OCR acquired information relative to the allegations from the complainants and [ ], from several students and one of their parents, and from the superintendent, the assistant superintendent, the administrators and six of [ ]'s past teachers at Kenilworth Junior High School (KJHS), five other staff people at KJHS, [ ]'s summer school principal and also [ ]'s current counselor and school psychologist.

OCR found the District in violation of Title IX of the Education Act of 1973. The following material summarizes the legal issues relevant to this investigation and the evidence upon which OCR based its conclusions. At the end of this report is the remedial action to which the District commits itself in order to comply with Title IX. Based upon this commitment, OCR finds the District currently in compliance with Title IX.

Investigative Findings and Analysis

Findings related to the Procedures of the District

The Regulation implementing Title IX of the Education Act, at 104 CFR Section 106.8(a), requires that recipients designate a responsible employee to coordinate their efforts to fulfill the requirements of Title IX, and to notify students and employees of the existence of the Coordinator. The Superintendent has been designated as the Title IX Coordinator of the District and this fact is published in the annual newsletter which is mailed out to all parents of students in the District and placed in the mailboxes of

teachers at school. By these actions the District is in compliance with Section 106.8(a).

Section 106.8(b) also requires recipients to adopt and publish grievance procedures providing for prompt and equitable resolution of complaints relevant to Title IX. The District provided OCR with copies of two grievance procedures which allow students and adults to file Title IX complaints within the District. OCR found that the procedures require complainants, including students, to have specific knowledge regarding the relevant policy and/or statute being violated and that the District has no procedure for publishing the existence of these grievance procedures.

OCR found that the District grievance procedures placed an undue burden on grievants insofar as they required unsophisticated grievants, including students, to cite specific provisions of statute or policy in support of their grievances. OCR therefore found the District in violation of Section 106.8(b) for failing to adopt an "equitable" grievance procedure, as well as failing to publish these procedures.

Finally, Section 106.9 requires that a recipient notify applicants, students and parents, and employees that it does not discriminate on the basis of sex in its educational programs or activities, and also, that it is required by Title IX not to discriminate in such a manner. The District does notify the parents and staff that it does not discriminate by using the District newsletter. OCR finds the District in compliance with Title IX Section 106.9 in this regard.

Findings related to the Issue of Sexual Harassment

The complainants allege that [ ] was verbally harassed while she was an eighth grader at the KJHS, by a group of 15-20 boys, who taunted her by yelling "Moo, moo" and making blunt and colloquial reference to the size of her breasts. The complainants allege that that this abuse occurred early in the morning before school, during classes, during lunch time and after school. The complainants state that the harassment began in September of the 1987-88 school year and finally ended sometime during summer school in 1988.

Section 106.31 prohibits a District from denying a student the benefits of, or subjecting a student to discrimination on the basis of sex in any academic, extracurricular, or other program or activity operated by the district. A district may not subject a student to separate or different rules of behavior, sanctions, or other treatment, nor limit a person in the enjoyment of any right, privilege, advantage, or opportunity on the basis of sex.

Harassment of a student because of his or her sex may have the effect of depriving that student of benefits or of subjecting them to different treatment on the basis of sex. Sexual harassment of a student is generally defined as verbal or physical conduct which is sexual in nature, and which has the purpose or effect of unreasonably interfering with the student's ability to benefit from their education, or of creating an intimidating, hostile or offensive environment. Harassing conduct which is addressed at a student because of their sex, and which has comparable effects on the student, may also constitute sexual harassment. A district which is aware that its students are being

subjected to sexual harassment has a duty under Title IX to take prompt and effective action to stop it.

In order to determine whether conduct between students constitutes sexual harassment for which a recipient may be held responsible under Title IX, OCR must consider four elements. First, it must examine whether the student has been harassed, and whether the harassment was based on, or related to, the student's sex. OCR next considers whether the harassment is sufficiently prolonged or severe to interfere with the student's ability to benefit from their education or to create a hostile or offensive environment. Third, it determines whether the recipient knew, or had reason to know, of the harassment. Finally, it examines whether the recipient took prompt and effective action in an effort to stop it.

Based on all of the interviews, OCR has concluded that the harassment did actually occur. In reaching this decision, OCR interviewed all witnesses identified by both the complainants and the District. Many of these witnesses had observed students "mooing" at [ ] in front of the school, in the cafeteria, in the school yard, and in classes. There can be no doubt that the conduct occurred, and that if continued to occur over the course of more than a year.

OCR further concludes that the harassment was sexual in nature. The complainants and some witnesses, including some students and the summer school principal, stated that that the sounds were expressly intended to refer to

[ ]'s bust size.[1] The superintendent also implied the sexual connotation of the boys' teasing [ ] by telling OCR that he had heard that [ ] provoked the harassment by the tight clothes which she wore. (No one else's testimony, nor the OCR investigator's observations, supported this allegation.) While other witnesses did not perceive a direct reference to bust size, all indicated that the "mooing" was a response to [ ]'s body. All of the adults OCR interviewed perceived this harassment as "teasing" rather than sexual harassment, and may not have responded decisively because of this perception. Nevertheless, OCR concludes that sustained references to a student's body in comparison to the body of a cow necessarily constitutes verbal conduct of a sexual nature.

OCR also concludes that the harassment created a hostile environment which had an adverse effect on [ ]'s ability to benefit from her education. The harassment clearly upset her. The complainants stated that [ ] was very depressed and even wrote a suicide note. The complainants took [ ] to a psychiatrist for help and then enrolled [ ] in group therapy sessions for girls. The testimony of the noon supervisor and two women teachers indicates that [ ] confided in them, crying about the suffering she felt from the harassment. A high school psychologist's report on [ ] states that she reported that she had been teased

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[1] One of the students whom OCR interviewed was obviously embarrassed with the sexual nature of this question and was reluctant to answer. OCR is therefore not sure if all of the students felt comfortable enough to describe the harassment as other than related to being overweight.

incessantly about her figure and consequently was having difficulty with peers. Other teachers and counselors reported that [ ] has an ongoing problem of low self-esteem, which they viewed as unrelated to the harassment, and to which they attributed her academic and emotional problems. Without attempting to apportion the reasons for [ ]'s social or academic difficulties, OCR concludes that the harassment created an environment which [ ] found hostile and intimidating, and that it adversely affected her self-esteem and her ability to benefit from the school.

Based on the testimony of the staff, OCR concludes that the District knew about the sexual harassment. Several staff members, including [ ]'s history teacher, the head custodian, and a noon supervisor, directly observed the harassment. The evidence indicates that the principal was informed of the harassment on at least four occasions: once by a substitute, to whom your daughter once compained [sic], once by the head custodian, and twice by the complainant. The knowledge of these individuals created a duty on the part of the District to take action to end the harassment.

OCR concludes that, although the District did respond to reports of the harassment, it failed to take sufficient appropriate action. When confronted with direct evidence that individual students had "mooed" [ ], the principal followed the school's disciplinary policy, verbally reprimanded them, warned them of future suspension for continued violations and enlisted their parents to continue the counseling at home. However, the principal's actions were insufficient to stop the harassment.

Although the principal told OCR that he saw each incident of harassment as a "one time occurrence," he was aware of its continuing nature. The continuity of the harassment should have signaled the principal that the harassment was more serious than implied by a few isolated incidents. The principal assigned the head custodian to watch for the behavior on one day. Beyond that, however, there is no evidence that he followed up on the reports he received by asking school staff to watch for the problem until April or May of 1988, over a year after the assistant principal first became aware of the problem. Nor did the principal check with the complainants or their daughter to ensure that the harassment had stopped.

Mr. Clecak told OCR that he never saw the harassment as sexual harassment but only as teasing. It appears that the assistant principal also treated the harassment as a series of isolated incidents of teasing, and did not coordinate her response to it with that of the principal.

The complainants told OCR that the principal told them that he could not stop junior high school students from "teasing" one another and suggested that the parents remove [ ] from school for a home education program. The principal denied stating that he could not stop the teasing. However, he neither confirmed nor denied recommending a home program. The complainants' testimony is supported by evidence that a prior victim of sexual harassment at KJHS had managed to escape the harassment only by transferring out of the school.

A recommendation for a home program, if it were made, would be particularly inappropriate. It would bring

about the end of the harassment only by denying the victim of harassment the benefits of an appropriate educational program while allowing the perpetrators to go without punishment. Moreover, such a recommendation might have violated the requirements of Section 504 of the Rehabilitation Act of 1973, and its implementing regulations, that students who are believed to need special education or related services be evaluated prior to a significant change in placement, and that they be placed in the regular program to the maximum extent appropriate to their individual needs.

OCR thus concludes that the complainant's daughter was subjected to sexual harassment, that the District knew of the harassment, and that, by failing to take prompt and effective action, the District failed to end it. Accordingly, OCR finds that the District subjected [ ] to discrimination on the basis of her sex in violation of Title IX.[2]

The District has agreed to take remedial action which, when implemented, will bring the District into compliance with Title IX. That remedial action is as follows:

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[2] OCR notes that not one administrator, teacher nor other staff person whom OCR interviewed ever interpreted this harassment as sexual harassment and none called or, by their own testimony, even thought of involving the Title IX Coordinator in these incidents. The District has informed OCR that it plans to increase the effectiveness of its Title IX coordination, by appointing a new Title IX Coordinator, by identifying individuals at each school site who shall be responsible for issues related to Title IX, and by publicizing the names and functions of these individuals to parents and staff members.

1. The District has appointed Ms. Anita Morris, the personnel assistant, as the district-level Title IX Coordinator.

2. Notification of this appointment along with the appropriate contact telephone number will be disseminated in a summer newsletter to be circulated throughout the community in August of 1989 to the residences of all enrolled students in the District, and to all classified and certificated employees.

3. Each junior and senior high school has identified an individual at its school site who shall be responsible for issues related to Title IX.

4. Notification regarding the identification of these responsible people, along with their contact telephone numbers, shall be announced to all staff by memos and/or meetings prior to the end of the 1988-89 school year, and to the respective school communities via school newsletters and bulletins.

5. The *Board Policy 4020, Title IX Adult Grievance Procedures: Certificated Grievance Procedures: Certificated/Classified* has been amended. The amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant.

6. The amended *Title IX Student/Parent Grievance Procedures* will be submitted to the Petaluma Board of Education in May of 1989. This amended policy deletes the reference under Step I that the area of policy and/or statute applicable must be included in the initial written grievance by the grievant. It was inadvertently omitted from being submitted to the Board with the employee's grievance policy. Should the Board fail to adopt the revised policy, OCR will immediately reopen the complaint.

7. The District will provide in-service training and development to the staff related to Title IX issues in order to assure greater awareness and sensitivity by all staff and students to sex discrimination on or before November 6, 1989. The training procedures and materials will include: bulletins, newsletters and workshops on November 6, 1989, school site staff meetings during the spring and the fall of 1989, curriculum modifications or changes for the junior and senior high schools, and counseling regarding traditionally male dominated classes.

8. The presidents of the Petaluma Federation of Teachers and the California School Employees Association have pledged their support to the District to assist in the development and the implementation of the above described in-service training of the District staff.

Based upon the written commitment by the District to fully implement the above corrective actions, OCR finds the District now in compliance with Title IX of the Education Act of 1972. It should be noted that this compliance finding is contingent upon adoption of the amended Title IX Student/Parent Grievance Procedures and upon the complete and timely implementation of the necessary corrective actions. In order to determine whether the District has implemented its commitments, OCR requests that the District submit a report, regarding the same issues, to OCR by November 17, 1989.

These findings apply only to the specific issues and circumstances described in this letter and should not be construed as an interpretation of the District civil rights compliance as to any other students or issues.

Under the Freedom of Information Act, it may be necessary to release this document and related records on request. If OCR receives such a request, it will seek to protect, to the extent provided by law, personal information which, if released, could reasonably be expected to constitute an unwarranted invasion of privacy.

OCR would like to thank you for your cooperation during the course of this investigation, particularly, the responsive actions of Dr. Richard Altimari during negotiations with OCR. If you have any questions regarding these findings, please contact Mr. Charles R. Love, Director, Elementary and Secondary Education Division, at (413) 227-8054.

/s/ John E. Palomino
John E. Palomino
Regional Civil
Rights Director
Region IX

UNITED STATES
DEPARTMENT OF EDUCATION [SEAL] NEWS

FOR RELEASE: July 1, 1998

Contact: Julie Green (202) 401-3026

STATEMENT BY U.S. SECRETARY OF EDUCATION
RICHARD W. RILEY
On the Impact on Title IX of the U.S. Supreme Court's
Gebser v. Lago Vista Decision

The Supreme Court's decision in the Lago Vista case emphasizes that school districts continue to have a responsibility under Title IX to provide students with a nondiscriminatory educational environment, and the Department of Education continues to have a critical role in enforcing that obligation. While the decision limits the situations where litigants can obtain damages from a school district in a private Title IX lawsuit, it does not undermine the fact that sexual harassment discrimination violates Title IX.

It is discrimination when an elementary or secondary school teacher abuses the authority given to him or her by the school district and engages in sexual conduct with his or her students. Although a plaintiff cannot obtain money damages where there was no notice to appropriate school officials, it is a violation of Title IX. A school district is therefore still responsible for taking reasonable steps to prevent and eliminate that type of misconduct. That means that every school system needs to take the problem of sexual harassment very seriously. When a school district learns of sexual harassment discrimination it must act immediately to end the harassment, eliminate the effects of the harassment on the victim and other students, and prevent the harassment from recurring.

Schools also should be taking preactive steps to identify problems – such as training staff to recognize and report potential harassment – and to follow-up on any information indicating potential discrimination.

Title IX mandates important mechanisms to help schools provide students with a safe educational environment. The Supreme Court's decision explicitly recognized that the Department can enforce administratively its Title IX regulation that requires schools and school systems to have well publicized policies against discrimination based on sex, including sexual harassment discrimination; to have effective and well-publicized procedures for students and their families to raise and resolve these issues; and to take prompt and effective action to equitably resolve sexual harassment complaints. The Department will continue to enforce this requirement.

Any sexual harassment of a student – particularly sexual abuse by a teacher – is a basic breach of trust between the school and the student and family. Schools owe students a safe environment that is conducive to learning and that affords children equal educational opportunity regardless of sex.

I encourage every school system to view the Supreme Court's recent decision as a challenge to work with parents and communities to ensure that they have effective policies and procedures in place to prevent sexual harassment, consistent with their continuing Title IX legal obligations.